

(25,595)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 765.

J. HOMER FRITCH, INCORPORATED; E. T. KRUSE, MARY
BELL PARKER BURNS, ET AL., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

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No. 2683

United States
Circuit Court of Appeals

For the Ninth Circuit.

J. HOMER FRITCH, INCORPORATED, a Corporation,
E. T. KRUSE, MARY BELL PARKER BURNS,
CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.

THE HISTORY OF THE

REIGN OF

CHARLES THE FIRST

BY

JOHN BURNET

OF THE UNIVERSITY OF OXFORD

IN TWO VOLUMES

LONDON

Printed by J. Streater, at the

Sign of the Gun, in St. Dunstons Church-yard

1679

By Authority

W. B. R.

Printed by J. Streater, at the

Sign of the Gun, in St. Dunstons Church-yard

1679

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL PAR-
KER BURNS, CECILIA SUDDEN, JAMES
HOGG, JAMES P. TAYLOR and KATE E.
SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondents.

**Petition for Moneys Due from United States Under
Contract of Hire.**

Now come the above-named J. Homer Fritch,
Incorporated, E. T. Kruse, Mary Bell Parker Burns,
Cecilia Sudden, James Hogg, James P. Taylor and
Kate E. Spiers, and respectfully petition the above-
entitled court in a matter arising upon a contract
with the Government of the United States, and al-
lege as follows:

I.

That J. Homer Fritch, Incorporated, one of the
above-named plaintiffs, is, and at all times herein
mentioned was, a corporation duly organized and ex-
isting under and by virtue of the laws of the State of
California; that the principal place of business of said
corporation is, and at all times herein mentioned was,
the City and County of San Francisco, [1*] State
of California; that said plaintiffs are residents of the

*Page-number appearing at foot of page of original certified Record.

City and County of San Francisco, State of California, and at all times hereinafter mentioned were the owners of the steamship "Homer."

II.

That, at all times herein mentioned, W. I. Lembkey was the duly appointed, qualified and acting agent of the Department of Commerce and Labor of the United States of the Seal Fisheries of Alaska; that on or about the 24th day of April, 1911, a charter-party was made and entered into by and between plaintiffs and the said Department of Commerce and Labor of the Government of the United States, in its material portions in words and figures as follows, to wit:

"THIS CHARTER PARTY, made and concluded upon in the City of San Francisco, the 24th day of April, 1911, between J. Homer Fritch, Incorporated, owners of the good twin-screw steamship "Homer" of San Francisco of 501 tons gross register, and 331 tons net register, having engines of 350 nominal horse-power provided with proper certificate for hull and machinery, and classes — at — of — tons cubic capacity and 700 tons dead weight or thereabouts, inclusive of bunkers, which are of the capacity of about 65 tons of coal, and stores now at the port of San Francisco and Secretary of Commerce & Labor U. S. Charters of the City of

Witnesseth, That the said owners agree to lot, and the said Charterers agree to hire the said steamship from the time of delivery, for a period of about [2] 31½ months steamer to be placed at the disposal of

the Charterers, at San Francisco in such dock or at such wharf or place (where she may always safely lie afloat, at all times of tide), as the Charterers may direct, and being, on her delivery ready to receive cargo, and tight, staunch, strong and in every way fitted for the service, including necessary dunnage, having water ballast, steam winches and donkey-boiler with capacity to run all the steam winches at one and the same time (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage), to be employed in carrying lawful merchandise, including petroleum or its products in cases, and passengers so far as accommodations will allow (but any expense necessary to fit the steamer to comply with United States or other Passenger Inspection laws to be borne by Charterers) between ports within the following limits: Pacific Coast ports and Unalaska, Dutch Harbor, the Pribilof Islands, Bering Sea, as the Charterers or their Agents shall direct, on the following conditions:

* * *

4. That the Charterers shall pay for the use and hire of the said vessel at the rate of One Hundred and Forty-two 50/100 (\$142.50) Dollars per day U. S. Gold Coin, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a day; hire to continue until her delivery in like good order and condition to the Owners (unless lost) at the port of San Francisco, Cal. * * * [3]

6. Payment of said hire to be made in U. S. Gold Coin monthly at the end of each month. * * *

21. That the Charterers have the option, at any time during this Charter, of purchasing the said vessel for the sum of Forty-five Thousand (\$45,000.-00) Dollars against which any amount paid for the hire of the said vessel less cost of operation shall be set off and deducted, but that the purchasers shall pay interest at the rate of 6% per annum (and insurance) on the amount of purchase money from the date of this Charter to the completion of the sale." * * *

J. HOMER FRITCH (INCORPORATED),
[Corporate Seal] J. HOMER FRITCH,
Prest.

Subject to approval of Dept. of Com. & Labor.
W. I. LEMBKEY,
Agent Seal Fisheries."

That in making and entering into and executing said charter-party said plaintiff, J. Homer Fritch, Incorporated, acted for itself and for and in behalf of, and as the duly authorized agent of the plaintiffs herein, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers. That said charter-party was duly approved by the Department of Commerce and Labor of the United States, and by the secretary thereof. [4]

III.

That thereafter, and to wit on the 15th day of May, 1911, said steamship "Homer" was placed by plaintiffs at the disposal of said Department, and said secretary, in all respects as to time, condition

of said vessel and equipment thereof, and otherwise in compliance with the terms of said charter-party; that thereupon and on the same day said Department and said secretary accepted said steamship "Homer," together with its equipment, and full complement of officers, seamen, engineers and firemen, as provided in said charter-party; that pursuant to said charter-party said steamship "Homer" was employed and retained by said Department and said secretary from and including the said 15th day of May, 1911, to and including the 12th day of September, 1911, at noon of said last-mentioned day.

IV.

That the hire of said steamship "Homer" becoming due under the terms of said charter-party on and subsequent to the 1st day of September, 1911, has not been paid to plaintiffs by said department or said secretary, or otherwise, or at all, nor has any portion thereof been so paid; that plaintiffs have frequently demanded payment of the same from said department and said secretary, but that said demands have been refused; that there is now due, owing and unpaid to plaintiffs from the United States the sum of one thousand, seven hundred and eighty-one and 25/100 (1781.25) dollars, as hire of said steamship "Homer" as aforesaid. [5]

And for a further cause of claim against the said United States, plaintiffs allege, in addition to all of the facts contained in paragraphs I, II and III of plaintiffs' first cause of claim hereinabove set forth, which are hereby repeated and made a portion of this cause of claim, the following:

IV.

That at all times during the month of September, 1911, and particularly upon the 12th day of September, 1911, Charles Earl was the duly appointed, qualified and acting secretary of the Department of Commerce and Labor of the United States; that on or about said 12th day of September, 1911, said Charles Earl, as such secretary, caused to be transmitted from the City of Washington, District of Columbia, to plaintiffs, at the City and County of San Francisco, and plaintiffs received at said last-mentioned place from said Charles Earl, as such secretary, a telegram in the following words and figures, to wit:

“Washington, D. C., Sept. 12-1911.

J. Homer Fritch, Inc.

San Francisco, Cal.

Would like to have option for purchase of Homer extended thirty days on terms mentioned in paragraph twenty-one of charter otherwise charter to terminate as provided therein answer.

CHARLES EARL,
Acting Secretary.”

That the signature to said last-mentioned telegram was the signature of Charles Earl, as acting secretary of the Department of Commerce and Labor of the United [6] States.

That said last-mentioned telegram was, by said Charles Earl, secretary as aforesaid, addressed to, and caused to be transmitted to, said J. Homer Fritch, Incorporated, for itself and as the agent of the other plaintiffs herein, and the same was re-

ceived by said J. Homer Fritch, Incorporated, for itself and as the duly appointed agent of the other plaintiffs herein.

That on the 14th day of September, 1911, plaintiffs caused to be transmitted to said Charles Earl, as secretary of the Department of Commerce and Labor of the United States, at the City of Washington, District of Columbia, and said Charles Earl, secretary as aforesaid, at said date and place received from plaintiffs, a telegram in the following words and figures, to wit:

“San Francisco, Sept. 14, 1911.

Acting Secretary,

Dep't. of Commerce & Labor,
Washington, D. C.

As requested in your telegram of twelfth instant charter Steamer Homer hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase.

J. HOMER FRITCH, Inc.”

That said telegram last referred to was sent by plaintiffs, as aforesaid, as a reply to said telegram dated September 12, 1911, hereinabove set forth.

That, in signing and causing to be transmitted as aforesaid said telegram dated September 14, 1911, said J. Homer Fritch, Incorporated, acted for itself and for and [7] in behalf of, and as the duly appointed agent of plaintiffs herein, E. T. Kruse, Mary Bell Parker Burns, Cecilia Sudden, James Hogg, James P. Taylor and Kate E. Spiers.

That, pursuant to the aforesaid extension of said charter, said steamship “Homer” was held by plain-

tiffs at San Francisco, from and including the 12th day of September, 1911, at noon of said day, to and including the 13th day of October, 1911, ready to receive cargo and in all respects in the condition required by the terms of said charter-party, with a full complement of officers, seamen, engineers and firemen for a vessel of her tonnage, for said Department and said secretary. That at all of said times said Department and said secretary knew or had reason to know that said steamship "Homer" was being so held in readiness by plaintiffs, as aforesaid.

VI.

That the hire of said steamship "Homer" becoming due in accordance with the terms of said charter-party as extended as above set forth from and including the 13th day of September, 1911, to and including the 12th day of October, 1911, has not been paid to plaintiffs by said Department or said secretary or otherwise or at all, nor has any portion thereof been so paid; that plaintiffs have frequently demanded the payment of the same from said Department and said secretary and such payment has been refused; that there is now due, owing and unpaid from the United States to plaintiffs, as such hire, the sum of four thousand four hundred and eighty-eight and 75/100 (4,488.75) dollars.

WHEREFORE, plaintiffs ask the judgment of [8] this Honorable Court against the said United States for the sum of six thousand one hundred and twenty-seven and 50/100 (6127.50) dollars, with interest thereon, and their costs of suit, and for such other and further relief as may be meet in the premises.

And plaintiffs will ever pray, etc.

J. HOMER FRITCH (INCORPORATED),

By JAMES B. SMITH,

President.

E. T. KRUSE.

MARY BELL PARKER BURNS.

CECILIA F. SUDDEN.

JAMES HOGG.

JAMES P. TAYLOR.

KATE E. SPIERS.

IRA A. CAMPBELL,

Attorney for Plaintiffs and Petitioners. [9]

State of California,

City and County of San Francisco,—ss.

James B. Smith, being first duly sworn, deposes and says:

That he is an officer, to wit, the president of J. Homer Fritch, incorporated, the corporation named as one of the petitioners and plaintiffs herein; that he makes this verification for and in behalf of said corporation, and as its president; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters, that he believes it to be true.

JAMES B. SMITH.

Subscribed and sworn to before me this 9th day of July, A. D. 1912.

[Seal]

JAMES MASON,

Notary Public in and for the City and County of San Francisco, State of California.

10 *J. Homer Fritch, Incorporated, et al.*

[Endorsed]: Filed Sep. 12, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [10]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

J. HOMER FRITCH, INCORPORATED, a Corpora-
tion, E. T. KRUSE, MARY BELL PARKER
BURNS, CECELIA SUDDEN, JAMES
HOGG, JAMES P. TAYLOR and KATE E.
SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondents.

**Affidavit of Service upon the United States District
Attorney, and of Mailing to the Attorney
General of the United States.**

City and County of San Francisco,
State of California,
Northern District of California,—ss.

C. T. Elliott, being first duly sworn, deposes and
says:

That he is, and at all times herein mentioned was,
the duly appointed, qualified, and acting United
States Marshal for the Northern District of Cali-
fornia;

That, on the 12th day of September, 1912, at the
City and County of San Francisco, State of Cali-
fornia, in the Northern District of California, affiant
personally served [11] upon John L. McNab,

Esq., the District Attorney of the United States, in and for the Northern District of California, personally, the annexed summons in the above-entitled action, by personally delivering to and leaving with said John L. McNab, personally, a true and correct copy of said summons; that at the same time and place affiant served said John L. McNab, District Attorney of the United States, as aforesaid, with the petition in the above-entitled action, by personally delivering to and leaving with said John L. McNab, personally, a true and correct copy of said petition; that said copy of said summons, and said copy of said petition, hereinabove referred to, were duly certified by the clerk of the said District Court of the United States, in and for the Northern District of California, Second Division thereof, to be true and correct copies of said summons and of said petition;

That, on the said 12th day of September, 1912, at the City and County of San Francisco, State of California, in the Northern District of California, affiant mailed a true and correct copy of said petition to the Attorney-General of the United States, by registered mail; that said copy of said petition last referred to was duly certified to be a true and correct copy of said petition by the Clerk of the District Court of the United States, in and for the Northern District of California, Second Division thereof; that affiant enclosed and sealed said copy in an envelope, addressed as follows, to wit:

Hon. George W. Wickersham,
Attorney-General of the United States,
Washington, D. C. [12]

admits that the hire of said steamship "Homer" becoming due under the terms of said charter-party on and subsequent to the first day of September, 1911, has not been paid to plaintiffs by said Department or said secretary, but denies that no portion thereof has been paid and in this regard respondent alleges that the sum of one hundred and seventy-six (\$176.00) dollars has been paid thereon by the said respondent.

Denies that plaintiffs have frequently demanded payment of the same from said Department or said secretary of the treasury or at all and denies that said demands have been refused and in this regard the [14] respondent alleges that on the 25th day of October, 1911, respondent wrote the plaintiffs herein as follows:

"You are therefore requested to submit to the Department bills for the chartering of the 'Homer' from September 1 to September 12, noon, 11½ days, at \$142.50 per day, and to give credit thereon to the Department for 32 tons of coal remaining in the Homer's bunkers at the time of the relinquishment at \$5.50 per ton."

Denies that there is now due, owing or unpaid to the plaintiffs from the United States, the sum of \$1,781.25 as hire of said steamship "Homer" on account of the matters set forth in the first count of said petition as aforesaid in any other or greater sum than \$1,462.75.

And for an answer to the second cause of action set forth in said petition, respondent denies and avers as follows, to wit:

Respondent has no information or belief upon the subject sufficient to enable him to answer the matters set forth in the last paragraph of section 4 of the said second count and basing his denial upon that ground, denies that pursuant to an extension of the charter referred to therein or at all, was the steamship "Homer" held by plaintiffs at San Francisco from and including the 12th day of September, 1911, at noon of said day to and including the 13th day of October, 1911, or at all, ready to receive cargo or in all or any respects in the condition required by the terms of said charter-party with a full complement of officers, or seamen or engineers or firemen for a vessel of her tonnage for the said Department or the said secretary.

Denies that at all of said times or at all did the said Department or said secretary know or have reason to know that said steamship "Homer" was being held in readiness by plaintiffs as aforesaid. [15]

Denies that any hire of the said steamship "Homer" became due in accordance with the terms of the said charter-party as extended and denies that the said charter-party was extended from or after the 13th day of September, 1911, or at all.

Admits that plaintiffs have frequently demanded the payment of the sum of \$4,488.75 on account of said hire for said alleged extension but denies that the said hire or any hire on account of any extension of said charter-party is now due, owing or unpaid from the United States to the plaintiffs.

JOHN W. PRESTON,
United States Attorney,
Attorney for Respondent.

State of California,

City and County of San Francisco,—ss.

M. A. Thomas, being first duly sworn, deposes and says that he is an Assistant United States Attorney for the Northern District of California; that no officer of the United States or of the Seal Fisheries of Alaska who is familiar with the facts in the above-entitled cause is within the State of California; that for the foregoing reasons affiant verified the foregoing answer and states that he has read the same and knows the contents thereof and that the same is true, except as to matters therein stated on information or belief and as to those matters he believes it to be true.

M. A. THOMAS.

Subscribed and sworn to before me this 11th day of May, 1915.

WALTER B. MALING,

Clerk U. S. District Court, Nor. Dist. Calif. [16]

[Endorsed]: Filed May 11th, 1915. Walter B. Maling, Clerk. [17]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECELIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondents.

Stipulation and Agreed Statement of Facts.

It is hereby stipulated and agreed between the
plaintiffs above named and the United States, re-
spondent herein, as follows:

1. That all of the facts alleged in count one of the
complaint herein are true with the following excep-
tions:

(a) The amount due for the hire of the S. S.
"Homer" from September 1, 1911, to noon of Sep-
tember 12, 1911, was \$1,638.75 instead of \$1,781.25,
as alleged in paragraph IV of said count one;

(b) Plaintiffs' consent that \$176 be offset against
this amount for coal left in the bunkers of said S. S.
"Homer," when possession was relinquished by the
United States. [18]

2. A jury having been duly waived by the respec-
tive parties, and the cause having been submitted

to the Court, sitting without a jury, it is hereby stipulated and agreed by and between the respective parties hereto that the following facts may be deemed and taken as proven upon the trial of said action and upon any trial thereof, and may be deemed to be in evidence for all purposes upon such trial:

I.

That J. Homer Fritch, Incorporated, one of the above-named plaintiffs, is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California; that the principal place of business of said corporation is, and at all times herein mentioned was, the City and County of San Francisco, State of California; that said plaintiffs are residents of the City and County of San Francisco, State of California, and at all times hereinafter mentioned were the owners of the S. S. "Homer."

II.

That at all times herein mentioned W. I. Lembkey was the duly appointed, qualified and acting agent of the Department of Commerce and Labor of the United States of the Seal Fisheries of Alaska; that on or about the 24th day of April, 1911, a charter-party was made and entered into by and between plaintiffs [19] and the said Department of Commerce and Labor of the Government of the United States. That said charter-party was in the words and figures following, to wit:

"TIME CHARTER.

THIS CHARTER-PARTY, made and concluded upon in the City of San Francisco, the 24th

day of April, 1911, between J. Homer Fritch, Incorporated, owners of the good twin-screw steamship "Homer" of San Francisco of 501 tons gross register, and 331 tons net register, having engines of 350 nominal horse-power provided with proper certificate for hull and machinery, and classes — at — of — tons cubic capacity and 700 tons dead weight or thereabouts, inclusive of bunkers, which are of the capacity of about 65 tons of coal, and stores now at the port of San Francisco and Secretary of Commerce & Labor U. S. Charters of the City of

Witnesseth, That the said owners agree to let, and the said Charterers agree to hire the said steamship from the time of delivery, for a period of about 3½ months steamer to be placed at the disposal of the Charterers, at San Francisco in such dock or at such wharf or place (where she may always safely lie afloat, at all times of tide), as the Charterers may direct, and being, on her delivery ready to receive cargo, and tight, staunch, strong and in every way fitted for the service, including necessary dunnage, having water ballast, steam winches and donkey-boiler with capacity to run all the steam winches at one and the same time (and with full complement of officers, seamen, engineers [20] and firemen for a vessel of her tonnage), to be employed in carrying lawful merchandise, including petroleum or its products in cases, and passengers so far as accommodations will allow (but any expense necessary to fit the steamer to comply with the United States or other Passenger Inspection laws to be borne by Charter-

ers) between ports within the following limits: Pacific Coast ports and Unalaska, Dutch Harbor, the Pribilof Islands, Bering Sea, as the Charterers or their Agents shall direct, on the following conditions:

1. That the owners shall provide and pay for all provisions, wages and consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service.
2. That the Charterers shall provide and pay for all the Coals, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the captain, officers or crews), and all other charges whatsoever, except those before stated.
3. That the Charterers shall accept and pay for all Coal in the Steamer's Bunkers, and the Owners shall on expiration of this Charter-party, pay for Coal left in the bunkers, at the current market prices at the respective ports where she is delivered to them.
4. That the Charterers shall pay for the use and hire of the said vessel at the rate of One hundred and Forty-two 50/100 (\$142.50) Dollars per day U. S. Gold Coin, commencing [21] on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a day; hire to continue until her delivery in like good order and condition to the Owners (unless lost) at The port of San Francisco, Cal.

5. That should the steamer be on her voyage towards the port of return delivery at the time a payment of hire becomes due, said payment shall be made for such a length of time as the owners or their agents, and Charterers, or their agents, may agree upon as the estimated time necessary to complete the voyage, and when the steamer is delivered to owner's agents any difference shall be refunded by steamer or paid by Charterers, as the case may require.

6. Payment of said hire to be made in U. S. Gold Coin monthly at the end of each month, and in default of such payment the Owners shall have the faculty of withdrawing the said steamer from the service of the Charterers without prejudice to any claim they (the Owners) may otherwise have on the Charterers, in pursuance of this Charter.

7. That the cargo or cargoes to be laden and / or discharged in any dock or at any wharf or place that the Charterers or their Agents may direct, provided the Steamer can always safely lie afloat at any time of tide.

8. That the whole reach of the Vessel's Holds, Decks, and usual place of loading, and accommodation of the ship (not more than she can reasonably stow and carry), shall be at the Charterer's disposal, reserving only proper and sufficient space for Ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel.

9. That the Captain shall prosecute his voyages with the utmost dispatch, and shall render all customary assistance [22] with Ship's crew and

boats. That the captain (although appointed by the Owners), shall be under the orders and direction of the Charterers as regards employment, agency, or other arrangements; and the Charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the Captain signing Bills of Lading or otherwise complying with the same.

10. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers or Engineers, the Owner shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

11. That the Charterers shall have permission to appoint a super-cargo who shall accompany the steamer and see that voyages are prosecuted with the utmost dispatch. He is to be furnished free of charge, with first-class accommodations, and same fare as provided for captain's table.

12. That the Master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct Log of the voyage or voyages, which are to be patent to the Charterers or their Agents.

13. That the Master shall use all diligence in caring for the ventilation of the cargo.

14. That the Charterers shall have the option of continuing this charter for a further period of thirty days (30) on giving notice thereof to the owners or their agents twenty (20) days previous to the expiration of the first-named term, or any declared option.

15. That if required by Charterers, time not to commence [23] before May 15, 1911, and should Steamer not be ready for delivery on or before May 18, 1911, Charterers or their agents to have the option of cancelling this charter, at any time not later than the day of Steamer's readiness.

16. That in the event of loss of time from deficiency of men or stores, break-down of machinery, stranding, or damage preventing the working of the Vessel for more than twenty-four consecutive working hours, the payment of hire shall cease until she be again in efficient state to resume her service, but should the Vessel be driven into port or anchorage by stress of weather or from any accident to the cargo, such detention or loss of time shall be at the Charterer's risk and expense.

17. That should the Vessel be lost, freight paid in advance and not earned (reckoning from the date of her loss), shall be returned to the Charterers. The act of God, enemies, fire, restraint of Princes, Rulers and the People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers, Steam Navigation, and Errors of Navigation, throughout this Charter-Party, always mutually excepted.

18. That should any dispute arise between the owners and the Charterers, the matter in dispute shall be referred to three persons in San Francisco, California, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court.

19. That the owners shall have a lien upon all cargoes and all sub-freights, for any amounts due under this Charter, and the Charterers to have a lien on the Ship for [24] all moneys paid in advance and not earned.

20. That all derelicts and salvages shall be for Owners' and Charterers' equal benefit. General Average, if any, to be according to York-Antwerp rules, 1890.

21. That the Charterers have the option, at any time during this Charter, of purchasing the said vessel for the sum of Forty-five Thousand (\$45,000.00) Dollars against which any amount paid for the hire of the said Vessel less cost of operation shall be set off and deducted, but that the Purchasers shall pay interest at the rate of 6% per annum (and insurance) on the amount of purchase money from the date of this Charter to the completion of sale.

22. That as the steamer may be from time to time employed in tropical waters during the term of this Charter, steamer is to be docked, bottom cleaned and painted whenever Charterers and Master think necessary, at least once in every six months and payment of the hire to be suspended until she is again in proper state for the service.

23. Steamer to work night and day if required by Charterers, and all steam winches to be at Charterers' disposal during loading and discharging, and Steamer to provide men to work same both day and night as required, Charterers agreeing to pay extra expense if any incurred by reason of night work, at the current local rate.

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24. It is also mutually agreed, that this Charter is subject to all the terms and provisions of and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of February, 1893, and entitled "An Act relating to the Navigation of Vessels, etc." [25]

25. Penalty for non-performance of this Contract, estimated amount of Charter.

Charterers are to pay at the rate of One Dollar (\$1.00) per day for subsistence supplied to passengers.

It is further understood that Capt. A. Donaldson shall go as master of the Stmr. "Homer" during the life of this charter.

J. M. LITCHFIELD, Witness
to the signature of

J. HOMER FRITCH (INCORPORATED. (Seal)

J. HOMER FRITCH, Prest.,
Agent.

Dated at, 19...

Subject to Approval of Dept.
of Com. & Labor:

J. M. LITCHFIELD, Witness
the signature of
a copy of the original Charter-party.

W. I. LEMBKEY,
Agent Seal Fisheries.

According to telegram of September 12th received from Mr. Chas. Earl, Acting Secretary, Department of Commerce & Labor, this charter is hereby extended for a period of 30 days from September 13th, 1911.

Subject to approval of Dept. of Commerce & Labor:

W. I. LEMBKEY,
Agent Seal Fisheries."

That in making and entering into and executing

said charter-party said plaintiff, J. Homer Fritch, Incorporated, acted for itself and for and in behalf of, and as the duly authorized agent of, the plaintiffs herein, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers. That said charter-party was duly approved by the Department [26] of Commerce and Labor of the United States, and by the secretary thereof.

III.

That thereafter and to wit, on the 15th day of May, 1911, said S. S. "Homer" was placed by plaintiffs at the disposal of said Department, and said secretary, in all respects as to time, condition of said vessel and equipment thereof, and otherwise in compliance with the terms of said charter-party; that thereupon and on the same day said Department and said secretary accepted said S. S. "Homer," together with its equipment, and full complement of officers, seamen, engineers and firemen, as provided in said charter-party; that pursuant to said charter-party said S. S. "Homer" was employed and retained by said Department and said secretary from and including the said 15th day of May, 1911, to and including the 12th day of September, 1911, at noon of said last-mentioned day.

IV.

That at all times during the month of September, 1911, and particularly upon the 12th day of September, 1911, Charles Earl was the duly appointed, qualified and acting secretary of the Department of Commerce and Labor of the United States; that on

or about said 12th day of September, 1911, said Charles Earl, as such secretary, caused to be transmitted from the City of Washington, District of Columbia, to plaintiffs, at the City and County of San Francisco, and plaintiffs received at said last mentioned place from said Charles Earl, as such secretary, a telegram in the following words and figures, to wit: [27]

“Washington, D. C. Sept. 12-1911.

J. Homer Fritch, Inc.

San Francisco, Cal.

Would like to have option for purchase of Homer extended thirty days on terms mentioned in paragraph twenty one of charter otherwise charter to terminate as provided therein answer.

CHARLES EARL,

Acting Secretary.”

That the signature to said last-mentioned telegram was the signature of Charles Earl, as acting secretary of the Department of Commerce and Labor of the United States.

That said last-mentioned telegram was, by said Charles Earl, secretary as aforesaid, addressed to, and caused to be transmitted to, said J. Homer Fritch, Incorporated, for itself and as the agent of the other plaintiffs herein, and the same was received by said J. Homer Fritch, Incorporated, for itself and as the duly appointed agent of the other plaintiffs herein.

That thereafter, and to wit on or about the 13th day of September, 1911, plaintiffs submitted said last-mentioned telegram to the said W. I. Lembkey,

the said agent of said secretary and said Department for the management of the Alaska Seal Fisheries, and thereupon the said Lembkey endorsed the following upon the original of said charter-party agreement:

"According to telegram of September 12th received from Mr. Chas. Earl, Acting Secretary, Department of Commerce & Labor, this Charter is hereby extended for a period of 30 days from September 13th, 1911.

Subject to approval of Dept. of Commerce & Labor,

W. I. LEMBKEY,
Agent Seal Fisheries." [28]

That thereupon, and on the 14th day of September, 1911, plaintiffs caused to be transmitted to said Charles Earl, as secretary of the Department of Commerce and Labor of the United States, at the City of Washington, District of Columbia, and said Charles Earl, secretary as aforesaid, at said date and place received from plaintiffs, a telegram in the following words and figures, to wit:

"San Francisco, Sept. 14, 1911.

Acting Secretary,

Dept. of Commerce & Labor,

Washington, D. C.

As requested in your telegram of twelfth instant charter steamer "Homer" hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase.

J. HOMER FRITCH, INC."

That in signing and causing to be transmitted, as

aforesaid, said telegram dated September 14th, 1911, said J. Homer Fritch, Incorporated, acted for itself and for and in behalf of, and as the duly appointed agent of plaintiffs herein, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers.

V.

That said S. S. "Homer" was employed by said secretary and said Department during the term of said charter-party, in connection with the work of said Department in carrying on the administration of the Alaska Seal Fisheries, and was sent by said Department to the Coast of Alaska; that said S. S. "Homer" arrived at the port of San Francisco from the coast of Alaska, prior to the twelfth day of September, 1911, being still in the possession of the said United States, pursuant to said charter-party [29] agreement, and having been continuously in the possession of said United States, since May 15th, 1911, as aforesaid, and forthwith proceeded to discharge her cargo;

That on the tenth day of October, 1911, plaintiffs caused to be transmitted to said secretary and said Department a telegram in the following words and figures, to wit:

"San Francisco, Oct. 10, 1911.

George M. Bowers,

Commissioner of Fisheries,

Dep't. of Commerce & Labor,

Washington, D. C. [30]

Your extension of charter and option of Steamer 'Homer' expires October 13th. Should this ex-

pire without further action on the part of the department Ship will go to holder of second option upon which one thousand dollars has been paid. Should you indicate that you wish to exercise your option terms of payment can be satisfactorily arranged without doubt. Kindly wire your wishes in the premises.

J. HOMER FRITCH."

That in sending said last-mentioned telegram said J. Homer Fritch acted in behalf of all of the plaintiffs herein; that said last-mentioned telegram was received by said secretary and said Department prior to the twelfth day of October, 1911; that thereafter and on said twelfth day of October, 1911, said secretary and said Department, in the City of Washington, District of Columbia, caused to be transmitted to plaintiffs, in the City and County of San Francisco, State of California, a telegram in the following words and figures, to wit:

Washington, D. C. Oct. 12-11.

J. Homer Fritch, Inc.

Fife Bldg., Sanfran.

Replying yours Oct ten Bureau of Fisheries is not in position to purchase Homer.

I. H. DUNLAP,
Actg. Commr."

That said last-mentioned telegram was received by plaintiffs at said City and County of San Francisco on the thirteenth day of October, 1911.

That on or about the 25th day of October, 1911, said secretary and said Department mailed a letter in the City of Washington, District of Columbia,

30 *J. Homer Fritch, Incorporated, et al.*

to plaintiffs, notifying plaintiffs [31] that said Department would not require the use of said S. S. "Homer," and would not exercise its option to purchase said "Homer"; that said letter was received by plaintiffs on or about the — day of November, 1911, and was in the following words and figures:

"Washington, October, 25, 1911.

Mr. J. Homer Fritch,
110 East Street,
San Francisco, Cal.

Sir:

Replying to your letter of the 14th instant, inclosing duplicate bills for charter of the steamship 'Homer' from September 1 to October 13, 1911, inclusive, you are informed that the vessel was discharged and relinquished to her owners on September 12 noon and that the Department has not extended or renewed the charter nor approved the action of any officer of the Department attempting to bind it for charter money beyond that time.

Respectfully,
(Sgd.)

BEN J. CABLE,
Acting Secretary."

That on said last-mentioned date the said Ben J. Cable was the duly appointed and qualified acting secretary for said Department.

VI.

That nothing has been paid by said United States or by said Department or by any person or persons whomsoever to plaintiffs, or to any of them, or at all, on account of hire earned by said steamship "Homer" for the period referred to herein, that is

to say, from the 12th day of September, 1911, to and including the 13th day of October, 1911; that plaintiffs have frequently demanded the same from said United States and said Department since said 13th day of October, 1911, but that said demand has been refused. [32]

It is stipulated that upon the trial of said cause of action the said facts may be deemed as true and as in evidence and as proven in all respects and with the same effect as if evidence had been offered to prove the same; it is further stipulated that as to the matters covered by this stipulation, said statement of facts may be deemed and taken as special findings of fact, and may be deemed and treated as such for all purposes; it is further stipulated that the parties hereto may offer such evidence, and evidence of such additional facts, as they or either or any of them may desire.

Dated, San Francisco, California, March 16th, 1915.

IRA A. CAMPBELL,
Attorney for Petitioners and Plaintiffs.

JOHN W. PRESTON,
Attorney for Respondent.

[Endorsed]: Filed May 4, 1915. Walter B. Mallin, Clerk. [33]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corpora-
tion, **E. T. KRUSE, MARY BELL PARKER
BURNS, CECELIA SUDDEN, JAMES
HOGG, JAMES P. TAYLOR and KATE E.
SPIERS,**

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondents.

Waiver of Trial by Jury.

A trial by jury, in the above-entitled action, is
hereby expressly waived.

Dated August 21, 1913.

IRA A. CAMPBELL,
Attorney for Petitioners and Plaintiffs.

B. L. McKINLEY,
United States Attorney.

By **T. H. SELVAGE,**

Asst.

[Endorsed]: Filed Aug. 21, 1913. **W. B. Maling,**
Clerk. By **J. A. Schaertzer,** Deputy Clerk. [34]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corporation,
E. T. KRUSE, MARY BELL PARKER
BURNS, CECELIA SUDDEN, JAMES
HOGG, JAMES P. TAYLOR and KATE E.
SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondents.

Findings of Fact.

The Court finds in the above-entitled case that all the facts admitted by the pleadings and the agreed statement of facts are true and in addition thereto finds:

1. That the steamship "Homer" was fully discharged of her cargo and turned over to the owners by the charterers on or prior to the 12th day of September, 1911, at the port of San Francisco, California.

2. That W. I. Lembkey did not have authority to extend the charter-party beyond the 12th day of September, 1911, and his attempted extension thereof was not ratified or approved by the Department of Commerce and Labor or by any Department or agent of the defendant.

3. That there was no contract or agreement be-

34 *J. Homer Fritch, Incorporated, et al.*

tween the plaintiffs and the defendant extending the charter-party beyond September 12, 1911. [35]

Conclusions of Law.

From the foregoing the Court concludes as follows:

First. That the plaintiffs are entitled to judgment upon the first count of the complaint for the sum of one thousand four hundred and sixty-two and 75/100 (1,462.75) dollars with interest thereon at the rate of seven per cent per annum from September 12, 1911.

Second. That respondent is entitled to judgment, that the plaintiffs take nothing on the second count of the complaint.

Let judgment be entered accordingly.

San Francisco, Cal.

Dated November 5th, 1915.

WM. C. VAN FLEET,

Judge of said Court.

[Endorsed]: Filed Nov. 5, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [36]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corpora-
tion, E. T. KRUSE, MARY BELL PARKER
BURNS, CECELIA SUDDEN, JAMES
HOGG, JAMES P. TAYLOR and KATE E.
SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

Judgment.

This cause came on regularly for trial on Tuesday, the 11th day of May, 1915, being a day in the March, 1915, term of said District Court, before the Court, sitting without a jury, a jury having been duly waived in writing signed by counsel for both parties in the manner prescribed by law, Ira A. Campbell, Esq., appearing at attorney for the plaintiffs and M. A. Thomas, Esq., Assistant United States Attorney, appearing for the defendant; and the trial having been proceeded with; and evidence oral and documentary upon the behalf of the respective parties having been introduced and the agreed statement of facts stipulated to by the respective parties having been also introduced, and the cause having been submitted to the Court for hearing and determination after argument; and the Court having made and filed its findings of fact and conclusions of law, and having ordered that judgment be entered in accord-

ance with the said findings and conclusions;

NOW, THEREFORE, by reason of the law and by reason of the premises aforesaid, and by reason of the findings of fact and conclusions of law aforesaid, [37]

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, as follows:

1. That petitioners and plaintiffs herein, J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecilia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, have and recover of and from the United States, respondent herein, upon the cause of action set forth and contained in the first count of the petition or complaint on file herein, the sum of one thousand four hundred sixty-two and 75/100 (1,462.75) dollars, together with the sum of four hundred twenty and 90/100 (420.90) dollars, being interest thereon at the rate of seven (7) per cent per annum, from the 12th day of September, 1911, to the date hereof.

2. That said plaintiffs take nothing by the second count contained in the petition or complaint on file herein.

Judgment entered November 5, 1915.

W. B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

A true copy. Attest:

[Seal]

WALTER B. MALING,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed Nov. 5, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [38]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corpora-
tion, E. T. KRUSE, MARY BELL PARKER
BURNS, CECELIA SUDDEN, JAMES
HOGG, JAMES P. TAYLOR and KATE E.
SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondents.

Bill of Exceptions.

BE IT REMEMBERED that on the 11th day of
May, 1915, the above-entitled cause came on regu-
larly for trial before the Hon. William C. Van Fleet,
Judge of the above-entitled court, a jury having
been duly waived in the manner required by law,
in writing, Ira A. Campbell, Esq., and John F. Cas-
sell, Esq., appearing as attorneys for the plaintiffs
and petitioners, and M. A. Thomas, Esq., Assistant
United States Attorney, appearing for respondents;
and thereupon the following proceedings were had:

[Proceedings Had May 11, 1915.]

The agreed statement of facts on file herein was
thereupon read. Said agreed statement is hereby
referred to and made a part hereof, but is not cop-

ied into this bill of exceptions inasmuch as it is on file herein. [39*—1†]

Mr. THOMAS.—You admit that the original charter terminated on the 12th of September, 1911?

Mr. CASSELL.—We contend that the charter was extended.

The COURT.—You say in your petition that the steamer on her return was formally tendered to the owner?

Mr. CASSELL.—It was tendered to the owner by the captain.

The COURT.—Yes; he is the one in charge.

Mr. CASSELL.—But these telegrams had arrived prior to that time.

The COURT.—That is a different thing. You admit that she was formally tendered by the Government upon her return to the owners?

Mr. CASSELL.—Yes, sir. I will read a portion of the agreed statement. In our complaint we have only set out the provisions that are material here. The stipulation admits that the first count is correct. The agreed statement entitles the plaintiff to judgment in any event upon the first count in the sum of \$1,638.75, with interest from September 12, 1911. The remainder of the agreed statement of facts relates entirely to the second count. (Reads):

I will ask Mr. Thomas to stipulate that there appeared on the telegram referred to in this agreed statement of facts the time at which the telegram

*Page-number of Original Certified Transcript of Record.

†Original page-number of Bill of Exceptions as same appears in Original Certified Transcript of Record.

was sent from Washington, which was 10:07 A. M.

Mr. THOMAS.—That is all right.

Mr. CASSELL.—And the agreed statement will be deemed amended in that respect?

Mr. THOMAS.—Yes.

The COURT.—It seems to me that that agreed statement should state as to when the vessel was fully discharged of her [40—1-a] cargo and turned over to the owners.

Mr. THOMAS.—That was the point I raised a while ago. We had in our agreed statement of facts that clause, and it was inadvertently struck out. That is why I asked counsel if he would stipulate that the original charter terminated on the 12th day of September, and that the vessel was turned over by the captain at that time. That is the statement as we had it, Mr. Cassell.

Mr. CASSELL.—I never stipulated that the charter was terminated.

The COURT.—The cargo had been discharged and the vessel was turned over to the owners on the 12th of September.

Mr. CASSELL.—Before it was actually turned over this new arrangement had been entered into on this telegram.

The COURT.—I am not discussing that. I am talking about the physical fact. You said it was turned over; I believe it was taken over to Oakland Creek.

Mr. CASSELL.—At about 10:30 this telegram was received from Washington; at 12 o'clock noon the vessel was to be turned over; our people went

to the dock and the vessel was turned over to them, and they put somebody in charge for the Government as they believed.

The COURT.—That is a matter of law whether they put somebody in charge on behalf of the Government, or not; he is simply asking you to stipulate as to what the fact was. The Court will determine what the legal effect was.

Mr. CASSELL.—The cargo had been discharged.

The COURT.—The cargo had been discharged and the vessel had been tendered to the owners.

Mr. CASSELL.—I would hardly say that it had been tendered [41—1-b] to the owners.

The COURT.—But you have said so yourself. I am simply quoting what you stated. You said it was taken by the owner and put in the Oakland Creek for the Government.

Mr. CASSELL.—I simply did not want to convey the idea that the Government tendered it to the owners with the idea that the charter was terminated.

While the captain and the others were paid by the owners, they were really in the employ of the Government. If Mr. Fritch went to the dock at 12 o'clock, if the charter was extended the "Homer" was not placed in his charge at all; it was actually in the hands of men—

The COURT.—We are not talking about that; the vessel's cargo had been discharged, had it?

Mr. CASSELL.—Yes, sir.

The COURT.—And you had been notified that the vessel was ready for the owners?

Mr. CASSELL.—We had been notified that the cargo was discharged.

The COURT.—The other is a matter of legal effect.

Mr. THOMAS.—I think I can clear that up by reading from this paper—

Mr. CASSELL.—I don't care to have it read, Mr. Thomas.

The COURT.—What is it?

Mr. THOMAS.—(Reading:) "That prior to the 12th day of September, 1911, said SS. "Homer" docked alongside the long [42—1-c] wharf, on the Oakland shore in the Bay of San Francisco; that on or prior to said 12th day of September, 1911, the captain of said steamship notified plaintiff that the voyage of said SS. "Homer" was complete, that the cargo was discharged and that she was subject to the order of the plaintiffs."

You will remember, Mr. Cassell, that I asked you to strike out from there down—from "Plaintiffs" down; I felt that that was the agreed statement of facts in that regard.

The COURT.—Well, was that the fact, in substance, that they had been notified.

Mr. CASSELL.—They had been notified that the voyage was terminated and that the cargo had been discharged.

The COURT.—That is all. I am not asking you to concede what the legal effect of it was. That is a matter for the Court to determine. [43—1-d]

[Testimony of John D. McKee, for Plaintiffs.]

JOHN D. McKEE, a witness called in behalf of plaintiffs, having been duly sworn, testified as follows:

The WITNESS.—I am vice-president of the Mercantile Trust Company of San Francisco, and president of the Mercantile National Bank, and held those offices during the year 1911. At that time the company known as J. Homer Fritch, Inc., was a debtor of the Mercantile Trust Company of San Francisco, and considerable control over the affairs of the Fritch Company was given to me in behalf of the Mercantile Trust Company of San Francisco. I knew at that time Mr. J. Homer Fritch, who was president of J. Homer Fritch, Inc. Mr. Fritch did not consult me about making the charter of the steamer "Homer" with the Government originally, but he did consult me about the extension. I knew that the "Homer" was chartered to the Government and had seen the charter and knew the terms of the charter. Whenever any steps concerning the chartering of the "Homer" were taken by Mr. Fritch I was consulted, and I was consulted as to practically all of the affairs of J. Homer Fritch, Inc. I have seen the telegram referred to in the agreed statement of facts in this case, from Charles Earl, acting secretary of J. Homer Fritch, Inc., dated September 12, 1911.

Mr. CASSELL.—Q. Mr. McKee, will you state when and where you first saw that telegram?

A. I am refreshing my mind now by looking at the date on the telegram; I saw it on the morning of the day that it was sent.

(Testimony of John D. McKee.)

Q. Sent by whom?

A. It was brought to me by Mr. Fritch. [44—2]

The COURT.—Q. You mean you saw it on the day that it was received here?

A. Yes, sir. I saw it on September 12, 1911. 1911. What I meant to say was that I am basing my statement on the date I see in the telegram before me; I have not any other means of recalling the date.

Mr. CASSELL.—Q. Where did you see it?

A. In my office.

Mr. CASSELL.—I offer this telegram in evidence.

Mr. THOMAS.—It is in the agreed statement of facts.

The COURT.—You had best identify it as the telegram of such and such a date and mentioned in the agreed statement.

Mr. CASSELL.—It will be stipulated that this telegram mentioned in the statement received from the Government by J. Homer Fritch Co., Inc., is this telegram.

Q. Who showed you that telegram?

A. Mr. Fritch.

Q. Was anyone else present at the time?

A. Yes, Mr. Lembkey.

Q. Do you remember anyone else being present?

A. I do not recall anyone else.

Q. That was in your office? A. Yes, sir.

Mr. CASSELL.—Q. Had Mr. Fritch been con-

(Testimony of John D. McKee.)

sulting you prior to that time concerning the affairs of the "Homer"?

A. Yes, sir.

Q. What was the situation of the "Homer," so far as you were concerned, at that time?

A. The Fritch interests in the "Homer" had been transferred to my name; the Fritch Company was ostensibly the managing owner and I was practically in control of the vessel, that is, of the Fritch interest in the vessel. [45—3]

Q. And that is the way he came to come to you?

A. Yes, sir.

Q. And it was desired both by you and by Mr. Fritch that the "Homer" should be sold to liquidate the debts of the company?

A. Mr. Fritch was very optimistic about the value of the boat and was sure the government would exercise the option and did not want the boat sold to anybody else. I wanted the boat sold as quickly as possible to liquidate the business.

Q. Did you at that time have any negotiations pending for the sale of the boat to somebody other than the Government if the Government did not make the purchase? A. Yes, sir.

Q. Were you yourself conducting negotiations looking to the sale of the "Homer" to someone other than to the Government if the Government did not purchase? A. Yes, sir.

Q. And did Mr. Fritch know that to be the fact?

A. Yes, sir.

Q. What took place at that meeting between your-

(Testimony of John D. McKee.)

self and Mr. Lembkey and Mr. Fritch on the occasion when Mr. Fritch showed you this telegram?

The COURT.—Who was Mr. Lembkey?

Mr. CASSELL.—He was the agent of the Department of Commerce and Labor for the control of the Seals Fisheries. That is a statutory position.

A. I met Mr. Lembkey for the first time that morning. Mr. Fritch brought him in to satisfy me that the arrangement would be consummated, that it was all right. I questioned [46—4] Lembkey about the telegram which they showed him and asked him what authority Mr. Earl had. Lembkey stated that Earl had an important position and stood high in the Department, and that any telegram like that was amply satisfactory, that I need not worry at all about that. I asked who the parties were who had executed the charter previously and was informed that Mr. Lembkey had executed it as the agent for the Seals Fisheries, or whatever it is; I then told Mr. Fritch that he should have Lembkey indorse an addition to the charter, indorse an extension on the bottom of the original charter. The charter was not in my possession; that was in Mr. Fritch's office as he was the managing owner. I had many of the other papers concerning the business of Fritch in the bank. I might state, Judge, that probably a year prior to this the Fritch company had gotten into financial difficulties and we had taken one of the young men of the bank and put him in charge of the Fritch business and Mr. Fritch was then representing his mother's interests, and we

(Testimony of John D. McKee.)

were then practically liquidating it.

Q. I will show you the last page of the charter-party, which is set forth in the agreed statement of facts, and ask you if you have seen that endorsement thereon, the endorsement at the foot of the page there.

A. I saw this charter-party before the endorsement was made and I saw it after the endorsement was made, but I did not see the endorsement made. That was made in some other office.

Q. Is that the endorsement you mentioned as having suggested that Mr. Lembkey should place upon that instrument?

A. Yes, I recommended that it be signed exactly as the original charter was signed. [47—5]

Q. Did Mr. Lembkey state, in your presence and in the presence of Mr. Fritch at that time, what he believed the reason of the Government to be for wanting the charter extended a period of 30 days?

A. Yes, sir.

Q. State what that was.

Mr. THOMAS.—I object to that, if your Honor please; it is not shown that any statement Mr. Lembkey would make would be binding upon the Government in this matter.

The COURT.—No, I think not. You have shown what took place, you cannot show the conversation.

Mr. CASSELL.—There is a deposition on file by Mr. Fritch. He is very sick; we took his deposition in place of bringing him here. In that deposition all of the correspondence is put in between Mr. Fritch

(Testimony of John D. McKee.)

and the Department leading up to this charter, and we believe that it is material. I am at a disadvantage in not having that before the Court, because I think it does show the materiality of the question I have just asked. I am going to take the liberty of reading just one portion of a letter to you, a letter dated December 2d. This correspondence is quite lengthy. This boat had been chartered by the Government every year for five or six years before. It was a peculiar boat. It was peculiarly adaptable to this work of the Government. Mr. Lembkey was anxious that the boat should be purchased by the Government. During the fall of 1910 there had been many negotiations between the Department and Mr. Fritch looking toward the purchase of the "Homer." It finally became apparent that the Government was not going to have sufficient funds available for the purchase of the "Homer" and they became desirous of extending the charter and putting in a clause of the character we have in clause 21 of the charter, whereby the Department [48—6] would be enabled to pay a portion of the purchase price and bring that amount up to an amount where the Department would have a fund available to pay on the balance of the purchase price. I will read one letter sent by Lembkey, writing for Mr. Bowers. This is the letter. (Reads Plaintiffs Exhibit No. 5.)

The COURT.—Your contract here is in writing; you can show what the situation was. Conversations and negotiations are not admissible here.

(Testimony of John D. McKee.)

Mr. CASSELL.—Unless your Honor is prepared to hold as a matter of law that the telegrams exclude the possibility of an extension of the charter, we think this is material.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 1.

Mr. CASSELL.—If your Honor please, I offer to prove by Mr. McKee that at that meeting Mr. Lembkey stated that it was his belief that the Government desired to extend the charter for 30 days and that one of its purposes for so doing was to bring the balance due under the contract under the charter-party down to an amount which the Government had available for the purchase of the "Homer."

The COURT.—Well, proceed; there is no objection.

Mr. THOMAS.—I will wait until he asks the questions. I thought your Honor had ruled.

Mr. CASSELL.—I had made an offer to prove.
[49—7]

The COURT.—We do not rule on offers to prove; we rule on objections to questions.

Mr. CASSELL.—Q. Will you state what was said by Mr. Lembkey at that time with regard to the purpose of the Department in desiring to extend the charter-party for 30 days.

Mr. THOMAS.—We object to that, if your Honor please, upon the ground that the charter-party shows on its face that anything Lembkey did was subject

(Testimony of John D. McKee.)

to the approval of the Department, and that Lembkey's private conversations with these gentlemen or his statements to them are in no way binding upon the Government.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 2.

Mr. CASSELL.—Q. Will you state what was the nature of the negotiations you then had pending for the sale of the "Homer" to other parties in the event that the sale to the Government did not go through in accordance with the terms of the provisions of clause 21 of the charter-party.

Mr. THOMAS.—We object to the question, if your Honor please, upon the ground that the answer would be immaterial, irrelevant and incompetent, and it would have no bearing at all on this case.

The COURT.—He has stated that there were negotiations and that is all that is material; the specific nature of them is not material. The objection is sustained. The fact is, Mr. Cassell, [50—8] I do not think it is material whether he had other negotiations. He had a right to want to sell the vessel to the Government, whether he had other people seeking it, or not.

Mr. CASSELL.—I do not desire to offer anything further in face of your Honor's ruling, but I want to show that the parties were acting in absolutely good faith, and that they actually did have prospects of selling the vessel.

(Testimony of John D. McKee.)

The COURT.—You don't have to show good faith in that regard.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 3.

Mr. CASSELL.—Q. Mr. McKee, I will show you a contract dated September 5, 1911, signed by yourself and Mr. W. S. Scammell, and I will ask you if that contract was made by yourself and Mr. Scammell on that date.

Mr. THOMAS.—If the Court please, I desire to object to any testimony concerning this contract as it does not appear to be within the issues—it does not purport to be a contract between the United States and the plaintiff here, and that it is immaterial, irrelevant and incompetent.

Mr. CASSELL.—This purports to be a contract between Mr. McKee and Mr. Scammell whereby Mr. Scammell was to purchase the "Homer" at a stated price. The contract contains this provision: 'If and when the charter on the steamer "Homer," in favor of the United States Government, shall terminate, which is [51—9] expected to be about 30 days from this date, and if the United States Government does not exercise its option to purchase said steamship "Homer," then the interest of the undersigned in the steamship "Homer" is sold and assigned to said Scammell at the rate of \$35,000 for the entire interest in the vessel.'

The Court thereupon sustained respondents' said

(Testimony of John D. McKee.)

objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 4.

Mr. CASSELL.—I will offer this as "Plaintiffs' Exhibit No. 1 for Identification." The said contract was thereupon marked Plaintiffs' Exhibit No. 1 for Identification and was in the words and figures following:

**[Plaintiffs' Exhibit No. 1 for Identification—
Memorandum, Dated September 15, 1911.]**

San Francisco, California, September 15, 1911.

Receipt is acknowledged by the undersigned from Mr. Walter S. Scammell of the sum of One Thousand (\$1000) Dollars, being payment on account of the purchase of the SS. "Homer" upon the following conditions:

If and when the charter now in force upon the SS. "Homer" in favor of the U. S. Government, which charter contains an option in favor of the U. S. Government to purchase the SS. "Homer," shall terminate (which is expected to be about [52—10] thirty days from this date), and if the U. S. Government does not exercise its option to purchase the said SS. "Homer," then the interest of the undersigned in the said SS. "Homer" is to be sold, assigned and transferred to the said Walter S. Scammell upon payment therefor at the rate of thirty-five thousand (\$35,000) dollars for the entire vessel, as follows:

Cash upon delivery of Bill of Sale, eight thousand (\$8,000) dollars, (including the deposit of \$1,000,

herein acknowledged) the balance in five equal notes payable to the order of the undersigned, six, twelve, eighteen, twenty-four and thirty months from date of transfer, bearing interest at six per cent. per annum, secured by first mortgage upon the said interest in the said SS. "Homer"; the maker and form of the said mortgage to be mutually satisfactory to the said Scammell and the undersigned.

If the U. S. Government exercises its option to purchase the said SS. "Homer," the above deposit of \$1000 is to be returned upon the order of the said Scammell.

If the option to purchase the said SS. "Homer" is not exercised by the U. S. Government, and the purchase of the said SS. "Homer" is not completed by the said Scammell (upon the conditions above set forth) within fifteen days after notice to him by the undersigned that the option of the U. S. Government [53—11] has not been exercised, then and in that event the above-mentioned deposit of \$1000 shall be forfeited to the undersigned.

The interest of the undersigned in the said SS. "Homer" to be transferred free and clear of all liens or indebtedness.

Insurance premium to be prorated.

Time is of the essence of this memorandum.

(Signed) JOHN D. McKEE.

Approved by:

W. S. SCAMMELL.

Witness:

W. J. WOODSIDE. [54—12]

Mr. CASSELL.—Q. Will you state when you first heard that the Government had declined to recognize the extension of the charter, the alleged extension of the charter, contained in the telegrams we have referred to?

Mr. THOMAS.—We object to this as immaterial.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 5.

Mr. CASSELL.—Q. Was it the belief of yourself, at that meeting and at all times thereafter during the months of September and October, 1911, that that charter had been extended by those telegrams?

Mr. THOMAS.—I desire to object to that question, your Honor, upon the ground that the belief of Mr. McKee is in nowise binding upon the defendant.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 6.

[Deposition of J. Homer Fritch, for Plaintiffs.]

The deposition of J. Homer Fritch, a witness on behalf of plaintiffs was thereupon read, said deposition having been taken by stipulation entered into between the parties and having been duly returned and filed herein.

The WITNESS.—I was the manager and president of J. Homer Fritch, Inc., during practically all of the time of its existence,— [55—13] ever since

(Deposition of J. Homer Fritch.)

1906. As manager of said corporation I had the management of the steamer "Homer." The steamer "Homer" was under charter to the United States Government prior to 1911, particularly to the Seal Fisheries of the Department of Commerce and Labor. It had been under charter to the Government for a number of years prior to 1911 and had been used by the department for the purpose of carrying supplies to the Pribilof Islands and bringing back skins from those islands. It was used each year by the Department from three to four months, generally the months of June, July, August, and a portion of the month of September.

Q. Who represented the Department in chartering the vessel from you?

A. Well, it was the officers of the Department; there was a number of them.

Q. Can you name some of them?

A. Yes. There was Lembkey; there was one that was the head of the Department; he was one of the principal ones.

Q. Did you have any dealings with Mr. Bowers?

A. Bowers,—yes.

Q. What were his initials, do you recall?

A. Bowers? No.

Q. George M. Bowers, was it?

A. George M. Bowers.

Q. How long prior to 1911 had you been dealing with Mr. Bowers?

A. I don't know—two or three years.

Q. How long had you known Mr. W. I. Lembkey prior to 1911?

(Deposition of J. Homer Fritch)

A. Prior to 1911, possibly—oh, let's see; I knew him first—I went on the steamer with him in 1898.

[56—14]

Q. 1898? A. Yes.

Q. And had you known him continuously since that time? A. Yes; met him every year since.

Q. How long had he been connected with the Department of Commerce and Labor prior to 1911?

A. Prior to 1911?

Q. Yes.

A. About, I think, eighteen to twenty years.

Q. Had you communicated with him concerning the charter of the steamship "Homer" each year?

A. No—oh, yes—well, no, not each year.

Q. On many different occasions?

A. Oh, yes; frequently. He was the principal business man.

Q. He was the agent of the Seal Fisheries?

A. He was the agent of the Seal Fisheries and all the actual business was done with him, except the chartering of the charter-party and that was frequently done by him.

Q. He made all the preliminary arrangements, did he not? A. Yes.

Q. Had any negotiations between you representing the owners of the steamship "Homer" on the one hand and Mr. Lembkey representing the Department of Commerce and Labor on the other hand been carried on looking toward the purchase of the steamer "Homer" prior to 1911?

A. Prior to 1911?

(Deposition of J. Homer Fritch.)

Q. Yes. A. There had been some talk of it.

Mr. CASSELL.—Q. How long prior to 1911 had there been talk of the Government purchasing the “Homer”? A. Oh, some few years. [57—15]

Q. What was the reason, if you know, for the Government desiring the “Homer”?

A. Because she seemed to be about adapted for their use; she seemed to be well adapted for their use.

Q. Who had charge as captain of the “Homer”?

A. Captain Donaldson.

Q. Was he a man experienced in those waters?

A. Yes.

Q. Had the Government made any prior offers looking toward the purchase of the “Homer” prior to 1911?

A. No. There had been more or less talk *about every year*; there was some talk of purchase.

Q. During what months of each year did the Government ordinarily charter the “Homer”?

A. June, July, August and September.

Q. And what period of each year did you ordinarily enter into negotiations looking toward the charter for the next year? A. Usually during the fall.

Q. During the fall of 1910 did you enter into negotiations with the Department either through Mr. Lembkey or Mr. Bowers, or any official of the Department, looking toward the charter of the “Homer” for the year 1911? A. Yes.

Q. Did you have any correspondence with either of those gentlemen or any officials of the Department?

(Deposition of J. Homer Fritch.)

A. Yes,—a number of gentlemen there; I don't remember exactly whom.

Q. Did you have correspondence of that character at that time with Mr. Lembkey?

A. Yes. [58—16]

Q. And Mr. Bowers? A. Yes.

Q. And with other officials of the Department?

A. Yes.

Q. In that correspondence did you deal with the question of chartering the "Homer" for the year 1911? A. Yes.

Q. And also did that correspondence deal with the subject of the possible purchase of the "Homer" by the Department? A. Yes.

Fourteen letters and nine telegrams were thereupon produced and it was stipulated that said letters and telegrams constituted the correspondence referred to in the witness' testimony, and that the copies offered were true and correct, and that said letters and telegrams were actually sent, at the respective dates which they bore, by the parties signing them, and that they were received in due course by the parties to whom they were respectively addressed. All of said letters and telegrams antedated the charter-party of April 24, 1911. Said letters and telegrams were thereupon offered in evidence by plaintiffs for the purpose of explaining any ambiguity that might be said to exist in the charter-party, or in any clause thereof, or in the agreement arrived at, bearing on the alleged extension of the charter-party.

(Deposition of J. Homer Fritch.)

Counsel for respondents thereupon objected to the admission of said correspondence, or any part thereof, upon the ground that the same was incompetent, irrelevant and immaterial, and upon the ground that all negotiations with reference to the chartering of the "Homer" were merged in the charter-party of April 24, 1911. The Court thereupon overruled said objection and admitted the following letters and telegrams in evidence: [59—17]

**Petitioners' and Plaintiffs' Exhibit No. 2 [Letter,
November 1, 1910, Fritch to Lembkey].**

November 1, 1910.

Mr. W. I. Lembkey,

Dept. of Commerce & Labor,

Washington, D. C.

Dear Lembkey:

Referring steamer "Homer" I have been thinking over this matter considerably within the last month and I have made up my mind that I will inform you and Mr. Bowers of the exact condition of things here so that you can make your arrangements accordingly and at the same time let me know what your intentions are in regard to the matter. In the first place ever since returning from Alaska I have had her under daily charter to the Pacific Coast Steamship Company and the ship is making good, in fact she has exceeded their expectations both in the amount of business offered and the amount of cargo carried and I have no doubt that she is making good money for them. They have been after me continually to tie the ship up to them for a year.

This, up to the present time, I have absolutely refused to do, but I have signed a Charter to extend until the first of March. I now have two or three of the different Iron Works in San Francisco figuring on installing a new boiler. This can be done during the month of March without any trouble providing, of course, that I place the order for this boiler forthwith.

I have always desired to do your business, preferably to sell the ship to the Government and work out the business on the lines talked of before you left, in regard to Captain, [60—18] etc., and this can be carried out provided the Government should see fit to purchase the steamer.

Of course, if the contract is made for the new boiler I should expect this contract to be assumed by the Government, providing they decide to purchase. Should the matter of purchase fall through, it is then up to the question of charter. The business that the "Homer" is at present engaged in, while it is profitable during the winter months it would be extra good during the summer months and as the Pacific Coast Steamship Company's *principle* business would be in the summer they naturally wish to tie this ship up so that they would have the use of her during the summer. On my part I am very anxious to place the ship in such a way that she can make money enough to pay for the installing of the new boiler. I hope I have made everything clear to you and that you will readily see my position in the matter. I wish to do the best I possibly can for the ship and owners and at the same

time I want to treat fair and square with your people in every respect.

Kindly confer with Mr. Bowers in regard to the matter and let me know your ideas so that I may act accordingly.

With very best wishes to your good self, Mrs. Lembkey, Mrs. Bowers and Mrs. Judge,

I remain,

Very truly yours,

J. HOMER FRITCH. [61—19]

**Petitioners' and Plaintiffs' Exhibit No. 3 [Letter,
November 12, 1910, Commissioner Bowers to
Fritch.]**

**DEPARTMENT OF COMMERCE AND LABOR,
Bureau of Fisheries,
Washington.**

November 12, 1910.

Mr. J. Homer Fritch,
Fife Building,
San Francisco, Calif.

Sir:

Replying to your letter of the 1st instant, with reference to the charter or sale of the "Homer" to the Government for use of the Seal Islands, you are requested, as a preliminary to the consideration of the question, to state the lowest price at which the "Homer" might be chartered for the summer; also, the lowest cash price at which she might be purchased outright. The charter price quoted should be predicated upon the installation of a new boiler and a square-sail for the foremast before the season of 1911 begins.

Please state also your idea of the cost of a new boiler and installation of the same.

Respectfully,

(Signed) GEORGE A. BOWERS,
Commissioner. [62—20]

**Petitioners' and Plaintiffs' Exhibit No. 4 [Letter,
November 23, 1910, Fritch to Bowers].**

November 23, 1910.

George M. Bowers,
Bureau of Fisheries,
Dept. of Commerce & Labor,
Washington, D. C.

Dear Mr. Bowers:

I beg to acknowledge receipt of your favor of November 12th, 1910, and in answer to the same I will say, the new boiler installed in the steamer "Homer" will cost about \$6,500.00. The United Engineering Works of San Francisco have agreed to supply a boiler identical with the one that the "Homer" has and with ample capacity to generate enough steam to do all the work necessary on board the ship; that is to say, they will take the old boiler out and replace the new one with all necessary fittings, piping, etc., and the same to pass inspection by the United States Inspectors of hulls and boilers for a lump sum of \$6,500.00 and will agree to do the work within thirty days after the ship is turned over to them. I wish to explain in detail my position in regard to the vessel so that you may know exactly how to act in the premises. As I informed you before the ship is under charter, at the present time, to the Pacific Coast Steamship Company until

the 1st of March, 1911. The Pacific Coast Steamship Company are very anxious to close a further charter with me extending over a period of one year, as they contend and very justly too, that if they use the ship through the winter and work up a business for her they [63—21] are very anxious to keep her through the summer, which is their busiest time. Furthermore, there are some parties here and in Seattle who also wish to charter the vessel for the season for the Kuskokwim River for the summer.

Personally I must say that I lean to the Government business, particularly as I have done the business of the Seal Islands so long and it has always been very satisfactory in every way. I should much prefer to make a sale of the ship outright and with this object in view I am perfectly willing to agree to deliver the ship to the Government with a new boiler installed, new *propellers*, and in thoroughly good sea-going condition, including square sale for the sum of \$43,500.00 net. Furthermore I will also agree to allow Captain Donaldson to take the ship during your season each year while he is in my employ. I have talked with him in regard to this matter and I have agreed to place a man in charge of the Steamer "Carlos" each year while he is away on your business. I will further agree to attend to your business here, giving you the use of my offices, clerks, stenographers, telephones, etc. under an agreement for a small consideration for disbursements, etc. the agreement being that there shall be no rent charged, if the present offices are

large enough to accomodate the business, which I think they are, should you desire to charter. The prospects for the coming summer are that we will be short on tonnage and in fact there is a very active market on tonnage at the present time in San Francisco. I have received several very flattering offers, however, I will be perfectly willing to charter to your people under the same conditions as last year at a daily rental of \$160.00 per day. [64—22]

I consider the new boiler will save the difference in rental between this price and last year's price in the consumption of coal, to say nothing of the *increase* sufficiency of the ship. You will greatly oblige me if you will give this matter your immediate consideration, as I am holding the other propositions up until such time as you shall indicate what you propose doing for futures.

You will understand friend Bowers that I am trying to do what I consider for the best interests of the Steamer "Homer," and her owners. At the same time, as I have said before, I am anxious to do your business and I sincerely hope that you will see your way clear to purchase the ship outright. With a new boiler, and the thorough overhauling which I propose to give her, you no doubt would have a good ship and one which has proven to be just about what you want to do your business.

With best wishes to yourself, Mr. Lembkey and Mr. Judge and hoping to get an early reply.

I remain,
yours Very truly,
J. HOMER FRITCH.

**Petitioners' and Plaintiffs' Exhibit No. 5 [Letter,
December 2, 1910, Lembkey to Fritch].**

DEPARTMENT OF COMMERCE AND LABOR.

Bureau of Fisheries.

Washington.

Personal.

December 2, 1910.

My dear Mr. Fritch. [65—23]

Your letter of November 23, regarding the purchase of the "Homer" is to hand. The Commissioner wished me to write you a personal letter about the matter.

The Commissioner desires to purchase the "Homer." The terms of purchase, however, require some adjustment. The situation is about as follows, and, as a business man, you will readily grasp it:

The appropriation, of which we have an unexpended balance this year and from which the purchase of the vessel was contemplated, has been decided to be not available for purchase of a vessel, although it can be used for chartering. We have, however, another appropriation of \$20,000, which can be used for purchase outright of a vessel for Alaska. The object, therefore, if a vessel should be purchased, is to pay the \$20,000 down as part payment of the purchase money, and to have the balance of the latter paid as charter money from the other appropriation.

If we were to charter the "Homer" this spring, therefore, it would be on the understanding that the charter money so paid should apply on the purchase

price. Then we could prolong the charter, perhaps, by laying her up in the Creek or by some other arrangement, until the charter money would reach an amount equal to the balance of the purchase price.

It is not good policy to have the charter-rate greater than it was last season (\$142.50). We would also like to be assured of the efficiency of the new boiler before installation. The question of price and terms would have to be discussed. I am giving you, however, a statement of the exact situation regarding funds and our limitations regarding them, and [66—24] invite an early expression of your views on the question whether an understanding could be reached on the basis outlined. Let me have any suggestions you may wish to offer regarding an arrangement.

The Commissioner leaves tonight for Europe. He sends his regards, as do all of us. We are all wearing "1915" buttons and rooting for San Francisco.

Very truly yours,

(Signed) W. I. LEMBKEY.

Mr. J. Homer Fritch,
Fife Building,
San Francisco, Calif.

**Petitioners' and Plaintiffs' Exhibit No. 6 [Letter,
December 8, 1910, Fritch to Lembkey].**

December 8, 1910.

Mr. W. I. Lembkey,
Dep't. of Commerce & Labor,
Bureau of Fisheries,
Washington, D. C.

Dear Mr. Lembkey:

I beg to acknowledge receipt of your favor of December 2d and in answer will say that I look favorably upon your proposition and that I have no doubt that we can come to terms on the lines indicated by your communication. This is merely a matter of arranging the details as to the daily rental of the ship. That matter can be adjusted perfectly satisfactory, as it would not make any particular difference as to the amount per day, provided the money was to be [67—25] applied as you suggest. As I understand your proposition you are willing to pay the \$20,000.00, cash. The balance of the money to be paid in the way of rental year by year. This will be perfectly satisfactory to me. As to the matter of details I would like you to indicate how you would want this done. I would suggest a out and out Bill of Sale upon making the first payment. The balance of purchase money to be secured by a mortgage on the ship or if you did not wish to do it in this way, it might be done by making the payment of \$20,000.00 and an agreement for a Bill of Sale upon the final payment. Ship to be insured in favor of both parties to secure interests as they may ap-

pear. On the strength of your communication to me, I will proceed at once to order the boiler and make all arrangements to have the vessel ready for your business by the first of May, 1911.

Any further suggestions or recommendations that you can make in reference to the matter will be duly appreciated.

In sending communications in regard to this matter, will you kindly mark all envelopes personal, so that the whole matter will come direct to me.

Very truly yours,

J. HOMER FRITCH.

**Petitioners' and Plaintiffs' Exhibit No. 7 [Letter,
December 15, 1910, Lembkey to Fritch].**

DEPARTMENT OF COMMERCE AND LABOR,
Bureau of Fisheries.

Personal. December 15, 1910, Washington,
[68—26]

My dear Mr. Fritch:

I beg to acknowledge the receipt yesterday of your letter of the 8th instant, in which you state that the idea conveyed in my personal letter of the 2d instant, regarding the purchase of the "Homer," is favorably received.

I must state frankly that, at first, I partially misunderstood the Commissioner's idea regarding the arrangements for purchase. It is his desire to make a charter in the usual way as though the question of sale were not under discussion; to allow the charter-money to accrue to an amount equal to the purchase price, less \$20,000; and then, being in a position to state that he virtually could buy the ship for

68 *J. Homer Fritch, Incorporated, et al.*

\$20,000, he would proceed to do so. This is the same proposition as contained in my former letter, except that the payment of the \$20,000 occurs at the latter end of the transaction instead of at the beginning. I hope this will make no difference in your calculations.

If I had the opportunity of speaking to you personally, I would be able more readily to explain the situation and to discuss price and terms. However, let me know how you regard the foregoing proposition.

Very truly yours,

(Signed) W. I. LEMBKEY.

Mr. J. Homer Fritch,

San Francisco, Calif. [69—27]

**Petitioners' and Plaintiffs' Exhibit No. 8 [Letter,
January 3, 1911, Fritch to Lembkey].**

January 3, 1911.

Mr. W. I. Lembkey.

c/o Commissioner of Fisheries.

Dep't. of Commerce & Labor.

Washington, D. C.

My dear Mr. Lembkey:

I beg to acknowledge receipt of your favor of December 15th and in answer will say, the proposition as indicated in your communication of the 15th is entirely different from the one made on December 2nd and this would necessitate an entirely new mode of procedure. How would a proposition be for a Charter by the year, a certain amount payable monthly, to commence at once, making different prices, while laid up and while in commission with

full new crew on board, suit you?

Suppose for instance that you would take the Ship now or as soon as these arrangements could be entered into at a net price of \$38,000.00, payable as follows: Charter money to commence at once at the rate of \$100.00 per day while laid up and \$142.50 per day while running. All expenses of wages, provisions, etc. to be deducted from these amounts and the net amount to be applied on account of purchase price. You to pay for the new boiler and any other repairs that you may wish done. The balance or last payment of \$20,000.00 to be made when the Ship has earned \$18,000.00 together with the money spent for repairs and interest on deferred payment and insurance. It seems to that an agreement on these lines [70—28] can be formulated, whereby we can cover both ends. The larger the amount paid as rental the sooner you could take the Ship over and possibly you would wish to increase the amount while laid up. That is to say, suppose we made the Charter at once at an agreed sum of say \$142.50 for say a period of two or three years, with an understanding that when she had earned \$18,000.00 as outlined above this amount to be clear of all expense of maintenance, insurance, interest, etc., you then to pay \$20,000.00 for the ship.

Kindly take this matter up with Mr. Bowers and give me your ideas of how that would suit you. Kindly let me know about this matter as soon as possible as there are a number of parties talking purchase and Charter. I now have a proposition from some Alaska parties for a Charter for the

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Summer, whereby the Ship can earn \$18,000.00 outside of interest and insurance, but it is a bad place to go and I have no doubt the insurance, if insurable at all, will be very heavy. If I can make a satisfactory arrangement with you, I prefer to do business with your Department with a prospect of taking up some other matters that may be a benefit to both, and again, if we can close a deal, I will be in touch with the Department for some little time and should anything occur whereby my services should be wanted I will be in a position to avail myself of any proposition you should wish to present.

With best wishes to Mr. Bowers, Mr. Judge and your good self and wishing you all the compliments of the season,

I remain,

Very truly yours,

J. HOMER FRITCH. [71—29]

**Petitioners' and Plaintiffs' Exhibit No. 9 [Letter,
January 12, 1911, Fritch to Lembkey].**

January, 12, 1911.

Mr. W. I. Lembkey,

c/o Commissioner of Fisheries,

Dep't. of Commerce & Labor,

Washington, D. C.

Dear Lembkey:

I wrote you a letter some little time ago in reference to the "Homer," but it is a little early yet to expect a reply. However, I wish you would take the matter up with Mr. Bowers and let me know your decision just as soon as possible. In connection with this matter there was a proposition that

came up yesterday from Captain Cottell of the Whalers, "Belvedere" and "Karlock." He will have from 500 to 1,000 barrels of whale oil in Dutch Harbor by the middle of June and he is very anxious to have that brought to San Francisco. As to the day of its arrival in Dutch Harbor he can arrange that, so as to fit in with your schedule up there, should you decide that you wish to take the oil. He will guarantee at least 500 barrels, or will pay \$500 freight unless he does not supply the 500 barrels. All over this amount is to pay \$1.00 per barrel, and he thinks he will have at least 800 to 1,000 barrels. The Steamer to use her winch in loading the same and Captain Cottell to supply the labor for stowing the same in the Ship's hold. This, I figure, would be fairly good freight as it handles quickly. However, this is a matter which I wish to bring to your attention as it may cut some figure in your calculations with the Steamer. [72—30]

The chances are there may be some other South bound freight we could pick up if we should so desire, all of which would help to pay the expenses of the vessel.

With best wishes to you all and hoping you can see your way clearly to accept my last proposition.

I remain,

Very truly yours,

J. HOMER FRITCH.

**Petitioners' and Plaintiffs Exhibit No. 11 [Letter,
January 30, 1911, Lembkey to Fritch].**

DEPARTMENT OF COMMERCE AND LABOR.

Bureau of Fisheries,
Washington.

January 30, 1911.

My dear Mr. Fritch:

I have delayed answering your last two letters until I could learn something definite in relation to the matter of the "Homer."

From what I can see at present, and without going into detail, I can say regretfully that there is little chance of purchasing the "Homer" until at least after July 1, next. This arises mainly from questions raised as to the propriety of the use for that purpose of some of the funds mentioned in my previous letters. It is a fact, however, that we will charter the "Homer," if the charter can be arranged to suit.

The main point in the matter, however, is the installation of the boiler. You will have to do that in time for the vessel to sail on June 1 proximo. While it will necessitate [73—31] the outlay of funds, it will increase the value of the ship and will return in purchase money.

The terms of the charter, etc., can be discussed later. My object in writing now is to ask you to go ahead with the boiler. With that done, we can use the vessel under charter, which we could not do without it.

Mr. Bowers is still in Europe and the date of

his return is not known. His lengthy stay is understood to be due to ill-health. I saw Mr. Davis the other day at the Willard.

With my kindest regards I am, believe me,

~~Sincerely yours,~~

(Signed) W. I. LEMBKEY.

**Petitioners' and Plaintiffs' Exhibit No. 12 [Letter,
February 4, 1911, Fritch to Lembkey].**

February 4, 1911.

Mr. W. I. Lembkey,

Dep't. of Commerce & Labor,

Washington, D. C.

Dear Mr. Lembkey:

I beg to acknowledge receipt of your favor of January 30th and in answer will say that I am very much disappointed at what you say in regard to the purchase of the Steamer "Homer." However, I have ordered the boiler and the boiler will be installed and the Ship ready for sea by the middle of May. Some two weeks ago, James McMillen came into the office and informed me that he was going on to Washington with a view that he was going to try and get the position of Government Representative in San Francisco. He also [74—32] desired that I should make a price to him on the Stmr. "Homer" for Charter to the Government. He told me that he had been looking up the Steamer "Grace Dollar" and also the "Phoenix." A day or two ago I met the owner of the "Phoenix" and he told me that Mr. McMillen had been there to see him with some representative from your Department. He did not know the

gentleman's name but he claimed to have the power to charter the vessel and he had looked over the "Phoenix" with Mr. McMillen and he said that he was prepared to do business. I thought this proceeding very strange, in view of the fact that I had been negotiating with your people and on the strength of these negotiations I had turned down several other propositions for charter of the "Homer," particularly, the one to the Kuskokwim Commercial Co. This proposition would have been, no doubt, a good one as I refused a six months Charter, to commence about May 15th at a daily rental of \$160.00 per day, Government form. I naturally came to the conclusion that the whole business as far as McMillen was concerned was of Jimmie looking for a little commission from this end. However, I am leaving this matter all in your hands and if there is any prospect of the Government not requiring the "Homer" I wish you would inform me as there are other opportunities offering and I do not care to leave the matter in a uncertain condition. She is at present under charter to the Pacific Coast Co., this charter to end April 15th. That will give me a full month in order to get the vessel in condition for your business. I hope the Department will not leave me in the lurch on this proposition, as I have held the vessel out [75—35] for you and it would not be right to have something turn up whereby I should lose the outside opportunities for other business.

I am very sorry to hear that Mr. Bowers is so indisposed and I sincerely hope that he will be im-

proved before I hear from you again. I sent you a little telegram on January 30th, hope you received it all right.

* * * * *

With best wishes, to you all,

I remain,

Very truly yours,

J. HOMER FRITCH,

Petitioners' and Plaintiffs' Exhibit No. 14 [Telegram, March 8, 1911, Commissioner to Fritch].

(Telegram—Postal Telegraph—Commercial Cables.)

513-Ch. Wx. 40-Govt.

Washington, D. C. Mar. 8, 1911.

J. Homer Fritsch,

Fife Bldg., San Francisco, Cal.

Provided new boiler installed by May fifteen will charter Homer for one Hundred forty two-fifty per day with option to buy applying charter money on purchase price. Wire answer.

COMMISSIONER OF FISHERIES.

Petitioners' and Plaintiffs' Exhibit No. 15 [Telegram, March 8, 1911, Fritch to Commissioner].

(Postal Telegraph Commercial Cables Night Lettergram.)

San Francisco, March 8, 1911.

Commissioner of Fisheries,

Washington, D. C. [76—34]

Wire March 8th received. New boiler will be installed and ship ready for service May 15th. Will accept your proposition all terms and conditions of last years charter to remain the same and an added

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option of purchase. The net charter money to apply on purchase price. Answer.

J. HOMER FRITCH.

Petitioners' and Plaintiffs' Exhibit No. 16
[Telegram, March 9, 1911—Commissioner to Fritch].

(Telegram — Postal-Telegraph — Commercial Cables.)

552 chs. 27 Govt.

Washington D C Mar. 9, 11.

J. Homer Fritch,

Fife Bldg Sanfran. Cal.

Your telegram eighth proposition to charter Homer accepted price at which vessel might be purchased to be determined later.

COMMISSIONER 135p.

Petitioners' and Plaintiffs' Exhibit No. 17
[Telegram, March 30, 1911—Commissioner to Fritch].

(Telegram — Postal Telegraph — Commercial Cables.)

303 chs. 51 Govt.

Washington D C Mar. 30-11.

J. Homer Fritch,

Fife Bldg Sanfran cal

Prepare sign and forward at once for approval six copies charter homer in accordance terms agreed upon in recent telegrams form and substance in other respects same as last years vessel to be delivered in seaworthy condition with new boiler may fifteen.

BOWERS COMMR. [77—35]

Petitioners' and Plaintiffs' Exhibit No. 20
[Telegram, April 6, 1911, Commissioner to Fritch.]

(Telegram — Postal Telegraph — Commercial
Cables.)

515 CH. OD. 57 Govt.

Washington, D. C., Apr. 6, 1911,

J. Homer Frieth,

Fife Bldg.,

San Francisco, Calif.

Charters furnished by you for Homer not witness lack corporation seal. Also lack clause that charter money apply toward purchase. Prepare and mail immediately charters on form used last year namely time charter government form as agreed in your telegram March eight last answer.

GEORGE M. BOWER,

Commissioner of Fisheries.

Petitioners' and Plaintiffs' Exhibit No. 21
[Telegram, April 7, 1911, Commissioner to Fritch.]

(Telegram — Postal Telegraph — Commercial
Cables.)

314-Ch. Wx. 21-Govt.

Washington, D. C., April 7, 1911.

J. Homer Fritch,

Fife Bldg., San Francisco, Cal.

Will prepare charter here accordance your telegram sixth and mail for your signature.

COMMISSIONER.

Petitioners' and Plaintiffs' Exhibit No. 22
[Letter, April 8, 1911—Acting Commissioner to
Fritch].

DEPARTMENT OF COMMERCE AND LABOR.

Bureau of Fisheries,
Washington. [78—36]

April 8, 1911.

Mr. J. Homer Fritch,
Fife Building,
San Francisco, Calif.

Sir:

In accordance with the suggestion in your telegram of the 6th instant, there are transmitted 6 copies of the form of charter-party used last year for the steamer HOMER. It is desired that you sign the enclosed copies in a manner conformable to the appropriate resolutions of your corporation and, having had these signatures witnessed and the corporate seal attached, that you return them to this Bureau with as little delay as practicable.

Respectfully,

H. DUNLAP,
Acting Commissioner.

6 enclosures.

Q. Mr. Fritch, did the Government require anything in the way of repairs to the "Homer" before it would charter the "Homer" for the season 1911?

A. She always had to be put in repairs; always had to drydock her and put all repairs into her in perfect order before she started. It is a long trip.

Q. Was there anything particular that was needed

(Deposition of J. Homer Fritch.)

in the way of repairs that were required before the Government would charter her for that particular year; was a new boiler required?

A. A new boiler. [79—37]

Q. What was the cost of installing that new boiler? A. About eight thousand dollars.

Q. Was that new boiler installed by you solely in the expectation of chartering the "Homer" for the season or with the expectation of selling the "Homer" to the Government?

A. I guess it was a little of both; I can't say that it was.

Mr. THOMAS.—I desire to object to that question and ask that the answer be stricken out on the ground that it calls for a conclusion of the witness.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 7.

Mr. CASSELL.—Q. Mr. Fritch, would you have installed a new boiler on the "Homer" if you had not been in the expectation of selling the "Homer" to the Government. As its managing owner would you have expended the sum of eight thousand dollars in the installing of a new boiler in the "Homer" if you had not been in the expectation of selling the "Homer" to the Government?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plain-

(Deposition of J. Homer Fritch.)

tiffs' Exception No. 8. [80—38]

Mr. CASSELL.—Q. Mr. Fritch, I show you a letter dated December 2d, 1910, purporting to be signed by W. I. Lembkey, and upon the stationery of the Department of Commerce and Labor, addressed to you, and being one of the letters heretofore offered in evidence, and I ask you if you received that letter during the month of December, 1910?

A. This is all right; I remember receiving that.

Q. I show you a letter dated December 15th, 1910, purporting to be signed by W. I. Lembkey, and upon the stationery of the Department of Commerce and Labor, addressed to yourself, and being one of the letters heretofore offered in evidence, and received in evidence, and ask you if you recall receiving that letter during the month of December, 1910; do you recall receiving that letter? A. Yes.

Q. Mr. Fritch, you will recall that clause 21 of the charter-party, which is embodied in the agreed statement of facts in this action, read as follows: "That the Charterers have the option, at any time during this Charter, of purchasing the said vessel for the sum of forty-five thousand (\$45,000.00) Dollars, against which any amount paid for the hire of the said Vessel, less cost of operation, shall be set off and deducted, but that the Purchasers shall pay interest at the rate of 6% per annum and insurance on the amount of purchase money from the date of this Charter to the completion of sale." In other words, under the charter-party which you subsequently made with the Government, the Govern-

(Deposition of J. Homer Fritch.)

ment had the right at any time during the charter to purchase the "Homer" from you for \$45,000, allowing the amount in part payment of whatever the Government paid to you as hire for the summer of 1911. Will you state whether or [81—39] not it was your expectation in inserting that clause in the contract that the Government would be able to pay cash for the balance due on the purchase price of the "Homer" at the expiration of the summer after the amount of hire had been paid for the summer months by the Government?

Mr. THOMAS.—I object to that question on the ground that it calls for the conclusion of the witness as to what his expectation was.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 9.

Mr. CASSELL.—Q. Mr. Fritch, I will ask you if in granting the Government an option to purchase the "Homer" by this 21st clause of the charter-party, you had in mind the representation made to you in the two letters to which I have referred, namely, the letters of December 2d, 1910, and December 15th, 1910, to the effect that the Department of Commerce and Labor would have a fund sufficient to pay for the balance of the purchase price of the "Homer" after it had paid the amount of hire for the summer months.

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondents' said

(Deposition of J. Homer Fritch.)

objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 10. [82—40]

Mr. CASSELL.—Q. Mr. Fritch, I ask you if you would have granted the Government this option to purchase the "Homer" had you not believed that the Department of Commerce and Labor had a fund sufficient to pay for the "Homer," as stated in these letters?

Mr. THOMAS.—I object to that question on the ground that it calls for the opinion or conclusion of the witness.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 11.

Mr. CASSELL.—Q. Did you believe that they had a fund of \$20,000 available?

A. Yes; I am pretty sure they had it.

Q. And did you believe they had this fund of \$20,000 referred to in the letters of December 2d, 1910, and December 15th, 1910, to which I have referred? A. Yes.

Counsel for respondents thereupon moved to strike out the answers to the foregoing questions upon the same grounds as those specified in the last exception. The Court thereupon sustained said objection, to which counsel for plaintiffs excepted; and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 12. [83—41]

Q. Mr. Fritch, do you remember how many trips

(Deposition of J. Homer Fritch.)

the "Homer" took for the Government in 1911.

A. I think there were two.

Q. Do you remember about what time the "Homer" returned from its last or second trip?

A. September, I think.

Q. There is set forth on page 11 of the agreed statements of facts in this case the following telegram: "Washington, D. C. September 12, 1911. J. Homer Fritch, Inc., San Francisco, Cal. We would like to have option for purchase of "Homer" extended thirty days on terms mentioned in paragraph 21 of charter otherwise charter to terminate as provided therein. Answer. Signed, Charles Earl, Acting Secretary." Do you recall receiving that telegram on the 12th day of September, 1911?

A. Yes.

Q. Do you recall what time of day you received it?

A. I think it was along about noon.

Q. What did you then do with it?

A. Why, I don't remember.

Q. Did you show it to Mr. Lembkey?

A. Yes, I showed it to Lembkey.

Q. Where did you meet Lembkey?

A. Let's see; I met Lembkey in the office, I think, or in the bank; I ain't sure which, whether I did not meet him in the bank.

Q. Did you have any discussion with him concerning that telegram? A. Yes.

Q. Will you state what that discussion was? [84-42]

A. Well, I don't remember exactly how. It

(Deposition of J. Homer Fritch.)

seemed to be very favorable; it looked as if the Government was going to take it, and one thing and another, and we sent a telegram on acknowledging that. Isn't there a telegram there?

Q. Mr. Fritch, I will read you a telegram set forth in page — of the agreed statement of facts as follows: "San Francisco, September 14th, 1911. Acting Secretary Department of Commerce and Labor, Washington, D. C. As requested in your telegram of 12th instant charter Steamer "Homer" hereby extended for further period of thirty days from September 13th, 1911, with option of purchase. Signed J. Homer Fritch, Inc." I will ask you if that is the telegram to which you just referred as one which you sent in reply to the telegram of September 12th?

A. Yes.

Q. State if you remember when you sent that telegram, where you were when you sent it?

A. No, I don't.

Q. Where did you go with Mr. Lembkey when you showed him that telegram, the telegram of the 12th, the one that you received from the Commissioner?

A. That is the question in my mind, whether that was not the telegram I showed him in the bank.

Q. Who else was present at that meeting in the bank? A. Mr. John D. McKee.

Q. Was anyone else present that you remember?

A. No.

Q. When you refer to the bank you mean the Mercantile Trust Company of San Francisco, do you not? A. Yes.

(Deposition of J. Homer Fritch.)

Q. On California Street? A. Yes. [85—43]

Q. And you were in the directors' room of that bank? A. Yes.

Q. And Mr. McKee was present? A. Yes.

Q. And Mr. Lembkey was present? A. Yes.

Q. Did you have the original charter with you at that time, the charter which is referred to in the agreed statement of facts?

A. No, I don't think so.

Q. Who had it at that time?

A. Well, Mr. Lembkey had it. We had three copies, you know—we had three or four copies.

Q. I hand you this document and ask you if that is one of the original copies of the charter. A. Yes.

Q. That is one of the original copies?

A. Yes, that is one of the original copies.

Q. I will ask you to look on page 8 of that original and identify if you can Mr. Lembkey's signature at the bottom of the page.

A. Yes, that is Mr. Lembkey's signature.

Q. Are you familiar with Mr. Lembkey's handwriting? A. Yes.

Q. And that is his signature?

A. That is his signature.

Mr. CASSELL.—I will offer that original copy of the charter-party in evidence and offer only the 8th page of it, it being stipulated that the rest is identical with the copy referred to in the agreed statement of facts.

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(Deposition of J. Homer Fritch.)

[Exhibit—Page 8 of Charter-Party.]

“-8-”

J. HOMER FRITCH
(Incorporated) (Seal)

J. M. LITCHFIELD, Witness to J. HOMER FRITCH, Prest.
the signature of Agents.

.....,
.....,

Dated at19..

[86—44]

Subject to approval of Dept.
of Com. & Labor:—

J. M. LITCHFIELD, Witness
the signature of a copy of the
original Charter-party.

W. I. LEMBKEY,
Agent Seal Fisheries.

According to telegram of September 12th received from Mr. Chas. Earl, Acting Secretary, Department of Commerce & Labor, this Charter is hereby extended for a period of 30 days from September 13th, 1911.

Subject to approval of Dept. of Commerce & Labor:

W. I. LEMBKEY,
Agent Seal Fisheries.

Q. I will ask you to look at page 8 of the original copy of the charter-party which is now in your hand, and particularly at the endorsement at the bottom of that page referring to the extension of the charter-party. I will ask you if you recall that endorsement being written upon that copy of the charter-party at that meeting in the Mercantile Trust Company.

A. I think that we adjourned to my office and wrote it; I think so; I won't be positive.

(Deposition of J. Homer Fritch.)

Q. Can you state that you either returned to your office and it was written on there in your office or that it was written at the Mercantile Trust Company?

A. Yes, it was one way or the other, but I believe it was in my office. [87—45]

Q. Did you see Mr. Lembkey sign his name to it?

A. Yes.

Q. Was there any discussion about it between you and Mr. Lembkey?

A. No: it was Mr. Lembkey's own suggestion.

Q. Did Lembkey say to you whether or not he believed that the charter had been extended by the Government?

Mr. THOMAS.—Object to the question on the ground that Lembkey's statement would not be binding on the Government in any event.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as plaintiffs' Exception No. 13.

Mr. CASSELL.—Q. Did Lembkey suggest that you communicate with the Government by wire?

A. In reference to what?

Q. In reference to the extension of the charter as suggested in the telegram of the 12th of September?

A. Yes. He not only suggested that we communicate with the Government—

Q. Let me ask you the question: Who prepared that telegram that was sent to the Department?

A. He did.

(Deposition of J. Homer Fritch.)

Q. He simply drew the phraseology of it?

A. Yes. [88—46]

Q. After the receipt of that telegram from the Government and after that endorsement had been put upon the charter which you have spoken of, what did you do with the steamer "Homer"?

A. Put her over in Oakland Creek and let her lay there, laid her up.

Q. Did Mr. Lembkey know that it was over there?

A. Yes.

Q. Did you tell Mr. Lembkey that it was over there? A. Yes.

Q. Did Mr. Lembkey go aboard?

A. I think he did, yes.

Q. How long after that was it that Mr. Lembkey went away, do you remember? A. No.

Q. How long did the "Homer" remain over there at the Oakland Creek?

A. Well, she remained the whole of that month anyhow, and how much longer I could not say now.

Q. Do you remember receiving a telegram from the Department of Commerce and Labor at any time in which they stated they would not be in a position to purchase the "Homer"? A. No.

Q. Well, you remember that the Government did not purchase the "Homer"? A. No, they did not.

Q. When did the Department tell you for the first time?

A. I don't know. Ain't that among those papers?

Q. There is a telegram referred to in the agreed

(Deposition of J. Homer Fritch.)

statement of facts in this case dated October 12th, 1911, addressed to J. Homer Fritch, Inc., signed by I. H. Dunlap, Acting Commissioner, which says, "Replying to yours October 10th Bureau of [89—47] Fisheries is not in position to purchase "Homer." That telegram is dated October 12th, 1910, just one month after the former telegram which we have referred to. Now, do you recall receiving such a telegram from the Government? Look at it; do you recall that telegram? A. Yes.

Q. That was one month, that was October 12th?

A. Yes.

Q. Now, did the Department of Commerce and Labor or any official of that Department or any one at all advise you at any time prior to October 12th, 1911, that the Department took the position that the charter had not been extended; did any one tell you prior to that date that the charter had not been extended; did the Government wire you to that effect?

A. I don't seem to remember it; is there anything in any of the telegrams?

Q. There is this telegram, Mr. Fritch, of October 12th, 1911. A. October 12th.

Q. This is the one I showed you (handing).

A. Oh, I see. No.

Q. Were there any telegrams received by you from the Department of Commerce and Labor or from any official of the Department of Commerce and Labor in which they said, "We do not consider that the charter has been extended," or "We won't exercise the option to purchase the 'Homer'?"

(Deposition of J. Homer Fritch.)

A. Not that I know of, unless they are in that file.

Q. You have no recollection of receiving any such telegram? A. No, I have not. [90—48]

Q. Did anyone tell you after that telegram which you sent on the 14th, at any time prior to this October 12th telegram, that the charter had not been extended? A. I don't know.

Q. You don't remember, anyway?

A. I don't remember, no. I don't remember when the charter was thrown up, or when they notified me that it would not be accepted.

Q. You received no telegrams from the Department concerning that matter which are not in either the agreed statement of facts in this case or in that file which you have offered in evidence?

A. I don't think so. I think you have got everything in that file—that is, you had all the papers that I had.

Q. And if you had received a telegram from the Government between the 12th day of September, 1911, and the 12th day of October, 1911, it would be in that file?

A. It would be in that file, yes.

Q. Do you remember whether during the month of September, 1911, you received any offer from any one other than the Government to purchase the steamer "Homer"?

Mr. THOMAS.—We object to that question as incompetent, irrelevant and immaterial.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plain-

(Deposition of J. Homer Fritch.)

tiffs now assign said exception to said ruling as Plaintiffs' Exception No. 14. [91—49]

Mr. CASSELL.—Q. Were negotiations pending during the month of September with other parties than the Department of Commerce and Labor in which you were looking towards the sale of the Steamer "Homer" to such parties in the event that the Government did not exercise its options?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 15.

Mr. CASSELL.—Q. Did those negotiations subsequently go through when the Government failed to exercise its option?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 16.

Cross-examination.

Mr. THOMAS.—Q. Mr. Fritch, were your relations with Mr. Lembkey friendly or otherwise?

A. Friendly—business relations. We had our relations every year, he representing the Government and me representing the owners of the ship. It was all business, right straight through, but still he was always friendly. [92—50]

Q. What were the circumstances of his drawing up that telegram you referred to that was sent either

(Deposition of J. Homer Fritch.)

from the bank or from your office?

A. We had talked the whole matter over in the bank and he said, "Yes"—he says, "That looks as if we had better—that is—well, that it should go ahead"; and he says, "I think you had better telegraph to them and tell them to extend it."

Q. Who sent that telegram?

A. I sent the telegram.

Q. Who wrote it? A. Mr. Lembkey wrote it.

Redirect Examination.

Mr. CASSELL.—Q. Mr. Fritch, after you received that telegram of September 12th from the Department and after Mr. Lembkey endorsed that extension on the copy of the charter-party to which we referred, and after you sent the telegram on the 14th, did you or did you not suppose that the charter-party had been extended for another month?

Mr. THOMAS.—I object to that question on the ground it calls for the conclusion of the witness.

The Court thereupon sustained respondents' said objection, to which plaintiff excepted, and plaintiffs now assign said exception to said ruling as plaintiffs' Exception No. 17. [93—51]

Mr. CASSELL.—Q. I am asking you for your belief. In putting the "Homer" out at the Oakland Creek, did you or did you not suppose that the charter had been extended and that it was there for the use of the Government?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondents' said objection, to which plaintiffs excepted, and plain-

(Deposition of J. Homer Fritch.)

tiffs now assign said exception to said ruling as Plaintiffs' Exception No. 18.

Plaintiffs rest.

Mr. THOMAS.—If your Honor please, I desire to offer in evidence a copy of an original appointment dated May 10, 1910, of Walter I. Lembkey as Agent of the Seal Fisheries in Alaska, together with an inclosure which is attached to it. There are only two pages of the inclosure I desire to offer in evidence, the first page reading as follows:

“W. I. LEMBKEY, Agent in charge Seal Fisheries, Washington, D. C.

First. Order to proceed to Islands. You are directed to leave Washington at a date to be determined hereafter and to proceed to the Pacific Coast; there you will purchase at reasonable prices after first securing competition, bids whenever practical, such merchandise as will be required in the Pribylof Islands for the natives and others. Preliminary arrangements have been made by this Bureau for chartering the steamer ‘Homer’ to transport these supplies to the islands [94—52] and to bring the sealskins from the islands in the fall. You are directed to complete the arrangements for such chartering and to sign such charter for the Government subject to the approval of the Department of Commerce and Labor.”

Then turning to paragraph 37 of the inclosure:

“Conclusion: Should questions arise involving matters not covered by these instructions it will be your duty to report the facts to the Department and

(Deposition of J. Homer Fritch.)

to await instructions except in cases requiring immediate decision, when you will take such action as sound judgment dictates."

This is certified by William Redfield, Secretary of Commerce.

Mr. CASSELL.—I object to this document upon the ground that Mr. Lembkey occupied a position the authority under which he held being defined by the statutes of the United States, to wit, the particular statute provides for the appointment of an agent for the Seal Fisheries for the Department of the Interior; 1 Fed. Stats. Annotated, 429. On the further ground that Mr. Lembkey was held out in the Department as its agent and as authorized to consummate the transactions that are involved here; upon the further ground that no notice of any limitations which may appear upon his authority in this document was ever brought to the notice of the plaintiffs. [95—53]

The COURT.—In dealing with Government agents you do not need to bring to the attention of the parties dealing with them the limitations of their powers; they are circumscribed by the law and everybody is presumed to know the law. It is not like dealing with a private agency at all.

Mr. CASSELL.—We contend that the law actually did define his authority. He was simply appointed as agent of the Seals Fisheries. There is one further ground of objection—there is nothing in this document that in any way limits Lembkey's authority so as to prevent him from taking part in the transactions.

(Deposition of J. Homer Fritch.)

The COURT.—That ground would be in your favor.

The Court thereupon overruled plaintiffs' said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 19.

The cause was thereupon argued by counsel for the respective parties, and thereupon the following proceedings were had:

The COURT.—I do not think, Mr. Cassell, that the Court would be justified in rendering a judgment against the Government on such uncertain evidence. There is room, however, for a different view, perhaps, but it should be taken by an Appellate Court. I think that, sitting as a court of first instance, I would not be justified in granting the relief asked in your second cause of action. You may have full [96—54] findings and if the Circuit Court of Appeals takes a different view it would simply result in judgment going your way for the balance. Judgment can go under the first cause of action for the amount due thereunder.

Mr. CASSELL.—And with interest, your Honor?

The COURT.—I suppose they are entitled to interest, aren't they?

Mr. THOMAS.—I think they are, if the Court please.

Mr. CASSELL.—I request the Court to find these facts: That for several years prior to the year 1911, the Department of Commerce and Labor had chartered from the plaintiffs the steamship "Homer"

(Deposition of J. Homer Fritch.)

for a period of from three to four months during the summer of each year; that the time of year during which the said "Homer" had been chartered by said Department during said years was usually the months of June, July, August, and a portion of the month of September.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 20.

Mr. CASSELL.—I request the Court to find as follows:

That the said "Homer" was used by said Department in connection with the carrying on of the Alaska Seal Fisheries, and particularly for the purpose of carrying supplies to the Pribilof Islands and of returning with a cargo of skins. [97—55]

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 21.

Mr. CASSELL.—I request the Court to find as follows:

That said steamship "Homer" was peculiarly adapted to the said purposes of the Department in connection with the said work of said Alaska Seal Fisheries.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said ex-

(Deposition of J. Homer Fritch.)

ception to said ruling as Plaintiffs' Exception No. 22.

Mr. CASSELL.—I request the Court to find as follows:

That for some time prior to the year 1911, said Department of Commerce and Labor had been desirous of purchasing said steamship "Homer" for the use of said Alaska Seal Fisheries.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Excetion No. 23.

Mr. CASSELL.—I request the Court to find as follows:

That the adaptability of said steamship "Homer" for the purposes of said Department in connection with said Alaska Seal Fisheries was recognized by W. I. Lembkey, the agent of said Department of Commerce and Labor for the said Alaska Seal Fisheries, and by George M. Bowers, the Commissioner of Fisheries, of the Department of Commerce and Labor, and it was desired by said Bowers and said Lembkey that said "Homer" should be purchased by the said Department for the use of said Alaska Seal [98—56] Fisheries, as aforesaid.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 24.

Mr. CASSELL.—I request the Court to find as follows:

(Deposition of J. Homer Fritch.)

That during the fall of 1910 and the spring of 1911, negotiations were pending between said Department of Commerce and Labor and the plaintiffs, looking towards the purchase of said steamship "Homer" by said Department from said plaintiffs.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling of Plaintiff's Exception No. 25.

Mr. CASSELL.—I request the Court to find as follows:

That prior to the 24th day of April, 1911, and the entering into of the charter-party referred to in the agreed statement of facts herein, the said Commissioner and the said Lembkey advised plaintiffs that the said Department desired to purchase said "Homer," but did not then have on hand and would not have on hand during the summer of 1911 a fund sufficient to purchase said "Homer" outright; that at said last-mentioned time, said Commissioner and said Lembkey further advised said plaintiffs that the said Department had and would have on hand a fund of \$20,000, which was and would be available for the purchase of said steamship "Homer," and that the said Department had on hand a further sum which, though not available for the purchase of said "Homer," would be available for the chartering thereof. [99—57]

The Court thereupon denied said request and re-

(Deposition of J. Homer Fritch.)

fused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 26.

Mr. CASSELL.—I request the Court to find as follows:

That at said last-mentioned time, said Commissioner and said Lembkey further advised said plaintiffs that, if said Department were to charter the "Homer" for the customary period during the summer of 1911, it would be on the understanding that the charter money so paid should apply on the purchase price of the "Homer," and further advised plaintiffs that the charter might then be prolonged by laying the "Homer" up in the Oakland Creek, or by some other arrangement, until the charter money should reach an amount equal to the balance of the purchase price.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 27.

Mr. CASSELL.—I request the Court to find as follows:

That section 21 of the charter-party of April 24, 1911, was inserted at the request of the Department of Commerce and Labor, and that prior to the date of the charter-party plaintiffs were advised by said Bowers and said Lembkey that, if Section 21 were inserted, the Department might desire to extend the

(Deposition of J. Homer Fritch.)

charter beyond the time when the "Homer" should return from Alaska, for the purpose of enabling the Department to pay such a further amount on the charter hire of the vessel as would, when added to the amount previously paid thereon bring the total to within \$20,000 of the purchase price of the "Homer." [100—58]

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 28.

Mr. CASSELL.—I request the Court to find as follows:

That upon receipt of this telegram of September 12, 1911, and prior to noon of that day, the plaintiffs exhibited the telegram to W. I. Lembkey, and Lembkey stated to them that, in his belief, it was the intention of the said Department to extend the charter-party for a further period of thirty days, and that the said Lembkey thereupon endorsed upon the charter-party the extension which appears at the end thereof.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 29.

Mr. CASSELL.—I request the Court to find as follows:

That the said Lembkey drafted the telegram of

(Deposition of J. Homer Fritch.)

September, 1911, hereinbefore set forth and advised plaintiffs that it be sent to the Department.

The Court thereupon denied said request and refused to make said findings, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception 30.

Mr. CASSELL.—I request the Court to find as follows:

That at or about noon of the 12th day of September, 1911, and after the receipt of the telegram of September 12, 1911, the said "Homer" was placed in the Oakland Creek by plaintiffs and there remained until subsequent to the 13th day of October, 1911, and the said Lembkey was fully advised [101—59] of the fact that the said "Homer" had been placed in Oakland Creek as aforesaid, and that said "Homer" was to remain there as aforesaid.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 31.

Mr. CASSELL.—I request the Court to find as follows:

That it was the intention of all of the parties by the telegram of September 12, 1911, in view of all of the circumstances, to extend or offer to extend the charter-party of April 24th for a further period of thirty days.

The Court thereupon denied said request and re-

(Deposition of J. Homer Fritch.)

fused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 32.

Mr. CASSELL.—I request the Court to find as follows:

That the meaning of the word "otherwise" used in the telegram of September 12, 1911, from the Department of Commerce and Labor to plaintiffs was, in view of all of the circumstances "in any other event," and not "in other respects." That is to say, the Department of Commerce and Labor, by said telegram meant that the said charter-party of April 24, 1911, should be terminated in the event that the option mentioned in Section 21 thereof was not extended, but that, if said option was extended, the charter was likewise to be extended for a further period of thirty days.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as [102—60] Plaintiffs' Exception No. 33.

Mr. CASSELL.—I request the Court to find as follows:

That the Department of Commerce and Labor duly received the telegram of September 14, 1911, and the telegram of October 10, 1911, set forth in the agreed statement of facts, and that, notwithstanding, the said Department did not advise the plaintiffs or any of them in any way that it had not

(Deposition of J. Homer Fritch.)

intended to extend said charter-party until after the 25th day of October, 1911.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 34.

Mr. CASSELL.—I request the Court to find as follows:

To find in favor of the plaintiffs upon the second count upon the ground that there is no substantial evidence to support a judgment in favor of the defendant upon the said second count.

The Court thereupon denied said request and refused to make said finding, to which ruling of the Court plaintiffs excepted, and now assign said exception to said ruling as Plaintiffs' Exception No. 35.

The Court thereupon proceeded to make its findings and, among other things, found as follows:

"That the steamship 'Homer' was fully discharged of her cargo and turned over to the owners by the charterer on or prior to the 12th day of September, 1911, at the port of San Francisco, California." [103—61]

To the making of this "finding" plaintiffs duly objected upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled plaintiffs said objection, to which ruling plaintiffs duly excepted, and now assign said exception as Plaintiffs' Exception No. 36.

The Court also found, among other things, as follows:

"That W. I. Lembkey did not have authority to extend the charter-party beyond the 12th day of September, 1911, and his attempted extension thereof was not ratified or approved by the Department of Commerce and Labor, or by any Department or Agent of the defendant."

Counsel for plaintiffs duly objected to the making of this finding upon the ground that there was no substantial evidence before the Court to support it.

The Court overruled said objection, to which ruling plaintiffs duly excepted, and plaintiffs now assign said exception as Plaintiffs' Exception No. 37.

The Court also found as follows:

"That there was no contract or agreement between the plaintiffs and the defendant extending the charter-party beyond September 12, 1911."

Counsel for plaintiffs duly objected to the making of this finding upon the ground that there was no substantial evidence before the Court to support it.

The Court thereupon overruled said objection, to which ruling plaintiffs duly excepted, and now assign said exception as Plaintiffs' Exception No. 38.

[104—62]

The foregoing constitutes all of the proceedings and all of the testimony offered and received on the trial of said action, and now, within the time required by law and the rules of this Court, said plaintiffs propose the foregoing as and for their bill of exceptions to the rulings of the Court made during

the trial of the above-entitled action, and to the decision of said Court, and pray that it may be settled and allowed as correct.

DATED San Francisco, California, November, 11th, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiff.

Stipulation as to the Correctness of Bill of Exceptions.

IT IS HEREBY STIPULATED that the above and foregoing constitutes a true and correct bill of exceptions in the above-entitled action, and that the same contains all of the proceedings had, and all of the testimony offered and received on the trial of the said action, and all of the rulings of the Court made during the trial of said action, and that the same may be settled and allowed as and for the bill of exceptions to such rulings and to the decision of the Court herein.

Dated San Francisco, California, November 11th, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiffs and Petitioners,
JNO. W. PRESTON,

U. S. Attorney.

M. A. THOMAS,
Assistant U. S. Attorney.

Attorneys for Respondent [105—63]

Order Settling, Certifying and Allowing Bill of Exceptions.

The foregoing bill of exceptions now being presented in due time and as amended by the Court and found to be correct, I do hereby certify that the said bill is a true bill of exceptions and contains all of the proceedings had and all of the testimony offered and received on the trial of the said action, and all of the rulings of the Court made during said trial, and all of the exceptions of the respective parties thereto.

Dated November 15th, 1915.

WM. C. VAN FLEET,

United States District Judge, Northern District of California.

[Endorsed]: Filed Nov. 15, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [106—64]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECILIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

Stipulation and Order Extending Time to File Findings, etc.

It is hereby stipulated and agreed by and between the respective parties hereto that the plaintiffs above named may have to and including the 12th day of July, 1915, within which to prepare a draft of findings and to deliver the same to the clerk of the above-entitled court for the Judge thereof, and to serve a copy thereof upon the above-named respondent pursuant to Rule 63 of the Rules of the above-entitled court, and that the said respondent shall have five (5) days thereafter within which to deliver to the clerk of said court, to serve upon said plaintiffs such proposed amendments or additions to such findings as it may desire.

IT IS FURTHER STIPULATED AND AGREED that said findings shall thereafter be settled by the Judge of said court and thereafter engrossed by said respondent as provided by said Rule 63.

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that no judgment shall be entered in said cause [107] until the said findings shall have been signed and filed as aforesaid, and that plaintiffs' attorney may have to and including twenty (20) days after written notice of the entry of judgment in said action within which to prepare, serve and file its proposed bill of exceptions for use upon the appeal, or writ of error from the said judgment.

Dated July 9th, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiffs.
JOHN W. PRESTON,
United States Attorney.

Good cause appearing therefor, and upon the foregoing stipulation, IT IS SO ORDERED this 9th day of July, 1915.

WM. H. SAWTELLE,
United States District Judge.

[Endorsed]: Filed Jul. 9, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [108]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECILIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

Stipulation and Order Extending Time to File Findings, etc.

It is hereby stipulated and agreed by and between the respective parties hereto that the plaintiffs above named may have to and including the first day of

August, 1915, within which to prepare a draft of findings and to deliver the same to the clerk of the above-entitled court for the Judge thereof, and to serve a copy thereof upon the above-named respondent pursuant to Rule 63 of the Rules of the above-entitled Court, and that the said respondent shall have five (5) days thereafter within which to deliver to the clerk of said court, to serve upon said plaintiffs, such proposed amendments or additions to such findings as it may desire.

It is further stipulated and agreed that said findings shall thereafter be settled by the Judge of said court and thereafter engrossed by said respondent as provided by said [109] Rule 63.

It is further stipulated and agreed by and between the parties hereto that no judgment shall be entered in said cause until the said findings shall have been signed and filed as aforesaid, and that plaintiffs' attorney may have to and including twenty (20) days after written notice of the entry of judgment in said action within which to prepare, serve and file its proposed bill of exceptions for use upon the appeal, or writ of error from the said judgment.

Dated July 12, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiffs.
JOHN W. PRESTON,
United States Attorney.

Good cause appearing therefor, and upon the foregoing stipulation, IT IS SO ORDERED this 13th day of July, 1915.

WM. C. VAN FLEET,
United States District Judge.

110 *J. Homer Fritch, Incorporated, et al.*

[Endorsed]: Filed Jul. 14, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [110]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECILIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

**Stipulation and Order Extending Time to File Find-
ings, etc.**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that the
plaintiffs above named may have to and including
the 14th day of August, 1915, within which to pre-
pare a draft of findings and to deliver the same to
the clerk of the above-entitled court for the Judge
thereof, and to serve a copy thereof upon the above-
named respondent pursuant to Rule 63 of the Rules
of the above-entitled court, and that the said re-
spondent shall have five (5) days thereafter within
which to deliver to the clerk of said court, to serve
upon said plaintiffs, such proposed amendments or
additions to such findings as it may desire.

IT IS FURTHER STIPULATED AND AGREED that said findings shall thereafter be settled by the Judge of said court and thereafter engrossed by said respondent as provided by said Rule 63.

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that no judgment shall be entered in said cause [111] until the said findings shall have been signed and filed as aforesaid, and that plaintiffs' attorney may have to and including twenty (20) days after written notice of the entry of judgment in said action within which to prepare, serve and file its proposed bill of exceptions for use upon the appeal, or writ of error from the said judgment.

Dated July 17, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiffs.

JNO. W. PRESTON,
United States Attorney.

Good cause appearing therefor, and upon the foregoing stipulation, IT IS SO ORDERED, this 17th day of July, 1915.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Jul. 19, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [112]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECILIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

**Stipulation and Order Extending Time to File Find-
ings, etc.**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that the
plaintiffs above named may have to and including
the 14th day of September, 1915, within which to
prepare a draft of findings and to deliver the same
to the clerk of the above-entitled court for the Judge
thereof, and to serve a copy thereof upon the above-
named respondent, pursuant to Rule 63 of the Rules
of the above-entitled court, and that the said re-
spondent shall have five (5) days thereafter within
which to deliver to the clerk of said court, to serve
upon said plaintiffs, such proposed amendments or
additions to such findings as it may desire.

IT IS FURTHER STIPULATED AND
AGREED that said findings shall thereafter be set-
tled by the Judge of said court and thereafter en-

grossed by said respondent as provided by said Rule 63.

IT IS FURTHER STIPULATED AND AGREED by and between the parties hereto that no judgment shall be entered in said cause until the said findings shall have been signed and filed, as [113] aforesaid, and that plaintiffs' attorney may have to and including twenty (20) days after written notice of the entry of judgment in said action within which to prepare, serve and file its proposed bill of exceptions for use upon the appeal, or writ of error from the said judgment.

Dated Aug. 11th, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiffs.

JNO. W. PRESTON,
United States Attorney.

Good cause appearing therefor, and upon the foregoing stipulation, IT IS SO ORDERED.

M. T. DOOLING,
United States District Judge.

Dated Aug. 11th, 1915.

[Endorsed]: Filed Aug. 11, 1915. Walter B. Maling, Clerk. [114]

*In the District Court of the United States in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECILIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

**Stipulation and Order Extending Time to File Find-
ings, etc.**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that
the plaintiffs above named may have to and includ-
ing the 14th day of November, 1915, within which to
prepare a draft of findings and to deliver the same
to the clerk of the above-entitled court for the judge
thereof, and to serve a copy thereof upon the above-
named respondent, pursuant to Rule 63 of the Rules
of the above-entitled court, and that the said re-
spondent shall have five days thereafter within
which to deliver to the clerk of said court, to serve
upon said plaintiffs, such proposed amendments or
additions to such findings as it may desire.

IT IS FURTHER STIPULATED AND
AGREED that said findings shall thereafter be set-
tled by the Judge of said court and thereafter en-

grossed by said respondent as provided by [115]
said Rule 63.

IT IS FURTHER STIPULATED AND
AGREED by and between the parties hereto that no
judgment shall be entered in said cause until the
said findings shall have been signed and filed, as
aforesaid, and that plaintiffs' attorney may have to
and including twenty days after written notice of
the entry of judgment in said action within which
to prepare, serve and file its proposed bill of excep-
tions for use upon the appeal, or writ of error from
the said judgment.

Dated October 11th, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiffs.
JNO. W. PRETSON,
United States Attorney.

Good cause appearing therefor, and upon the fore-
going stipulation, IT IS SO ORDERED.

WM. C. VAN FLEET,
United States District Judge.

Dated October 13, 1915.

[Endorsed]: Filed Oct. 13, 1915. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [116]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECILIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

Petition for Writ of Error.

J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, Petitioners and Plaintiffs in the above-entitled action, feeling themselves aggrieved by the decision of the Court denying them relief, and holding that they take nothing by reason of the second count in their complaint and petition contained, and by that portion of the judgment of the Court entered herein on the 5th day of Nov., 1915, wherein it was ordered, adjudged and decreed that said plaintiffs and petitioners take nothing by their said second count so contained in their said petition and complaint, come now by Ira A. Campbell, Esquire, their attorney, and petition said Court for an order allowing said petitioners and plaintiffs to prosecute a writ of error to the Honorable, the United States

Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the [117] United States in that behalf made and provided, and also that an order be made fixing the amount of security which the plaintiffs and petitioners shall furnish upon said writ of error.

And your petitioners will ever pray.

November 15th, 1915.

IRA A. CAMPBELL,

Attorney for said Petitioners and Plaintiffs.

[Endorsed]: Filed Nov. 15, 1915. W. B. Maffing, Clerk. By J. A. Schaertzer, Deputy Clerk. [118]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No 15,599.

J. HOMER FRITCH, INCORPORATED, a Corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECILIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

Assignment of Errors.

Come now J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and

Kate E. Spiers, petitioners and plaintiffs herein, and make and file the following assignment of errors, upon which they will rely in the prosecution of their writ of error in the above-entitled cause:

1.

The above-entitled Court erred in holding and determining that respondent was entitled to judgment that said plaintiffs take nothing on the second count of their complaint herein.

2.

The Court erred in holding and determining that the charter of the steamer "Homer," dated April 24, 1911, was not extended by the respective parties thereto for a further period of thirty (30) days from and after the 13th day of September, 1911. [119]

3.

The Court erred in holding and determining that respondent did not become liable to the plaintiffs for the charter hire of the steamer "Homer" for a period of thirty (30) days from and after the 13th day of September, 1911.

4.

The Court erred in holding and determining that by its telegram, dated September 12, 1911, to J. Homer Fritch, Incorporated, the Department of Commerce and Labor did not offer to extend the charter of said steamer "Homer," dated April 24, 1911, for a further period of thirty (30) days.

5.

The Court erred in holding and determining that there was no meeting of minds between plaintiffs

and the said Department of Commerce and Labor with regard to the extension of the charter-party of April 24, 1911, or the option beyond September 12, 1911.

6.

The Court erred in holding and determining that the language of the telegram of September 12, 1911, from the Department of Commerce and Labor to the plaintiffs, taken in connection with the charter-party and paragraph twenty-one (21) thereof and all the evidence introduced on behalf of the parties thereto, shows that the intention of the Department of Commerce and Labor was to secure an extension of the option to purchase merely, and was not to extend or offer to extend the said charter-party for a period of thirty (30) days, or any other period. [120]

7.

The Court erred in holding and determining that notwithstanding any previous correspondence between the Department of Commerce and Labor and the plaintiffs with regard to the purchase of the steamer "Homer," there was no extension of the charter-party beyond the 12th day of September, 1911.

8.

The Court erred in refusing to hold upon the undisputed evidence that it was the intention of the Department of Commerce and Labor in sending said telegram of September 12, 1911, to offer to extend said charter-party of April 24, 1911, for a further period of thirty (30) days.

9.

The Court erred in holding and determining that the Department of Commerce and Labor was not estopped from asserting that it had not intended, by said telegram of September 12, 1911, to offer to extend said charter-party of April 24, 1911, for a further period of thirty (30) days.

10.

The Court erred in refusing to hold that the necessary meaning of said telegram of September 12, 1911, by reason of the language-implied therein; was that said Department of Commerce and Labor intended thereby to offer to extend said charter-party of April 24, 1911, for a further period of thirty (30) days.

11.

The Court erred in refusing to hold and determine that the necessary meaning of said telegram of September 12, 1911, by reason of the terms and expressions used therein and by [121] reason of the circumstances under which said telegram was sent, and disclosed by the prior transactions between the parties, and their prior correspondence, as disclosed by the undisputed evidence, was that said Department of Commerce and Labor intended by said telegram to offer to extend said charter-party of April 24, 1911, for a further period of thirty (30) days.

12.

The Court erred in holding and determining that the extension of said charter-party for a further period of thirty (30) days by W. I. Lembkey was never in fact approved by the Department of Commerce and Labor.

13.

The Court erred in holding and determining that said Department of Commerce and Labor was not bound by the statements of said Lembkey, which the undisputed evidence shows were made by said Lembkey to plaintiffs at the time of said alleged extension of said charter party, to the effect that he believed the Department intended to offer to extend said charter-party for a further period of thirty (30) days by said telegram of September 12, 1911.

14.

The Court erred in not holding and determining that the said Department of Commerce and Labor was not bound in any respect by the knowledge or statements or actions of said Lembkey with respect to the extension of said charter-party.

15.

The Court erred in sustaining respondent's objection to a question propounded to the witness, John D. McKee, [122] covered by Plaintiffs' Exception No. 1, as follows:

"Q. Did Mr. Lembkey state, in your presence and in the presence of Mr. Fritch at that time, what he believed the reason of the Government to be for wanting the charter extended a period of 30 days? A. Yes, sir.

Q. State what that was.

Mr. THOMAS.—I object to that, if your Honor please; it is not shown that any statement Mr. Lembkey would make would be binding upon the Government in this matter.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 1."

16.

The Court erred in sustaining respondent's objection to a question propounded to the witness, John D. McKee, covered by Plaintiff's Exception No. 2, as follows:

"Mr. CASSELL.—Q. Will you state what was said by Mr. Lembkey at the time with regard to the purpose of the Department in desiring to extend the charter-party for 30 days.

Mr. THOMAS.—We object to that, if your Honor please, upon the ground that the charter-party shows upon its face that anything Lembkey did was subject to the approval of the Department, and that Lembkey's private conversations with these gentlemen [123] or his statements to them are in no way binding upon the Government.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiff's Exception No. 2."

17.

The Court erred in sustaining respondent's objection to a question propounded to the witness, John D. McKee, covered by Plaintiff's Exception No. 3, as follows:

"Mr. CASSELL.—Q. Will you state what was the nature of the negotiations you then had

pending for the sale of the 'Homer' to other parties in the event that the sale to the Government did not go through in accordance with the terms of the provisions of clause 21 of the charter-party.

Mr. THOMAS.—We object to the question, if your Honor please, upon the ground that the answer would be immaterial, irrelevant and incompetent, and it would have no bearing at all on this case.

The COURT.—He has stated that there were negotiations and that is all that is material; the specific nature of them is not material. The objection is sustained. The fact is, Mr. Cassell, I do not think it is material whether [124] he had other negotiations. He had a right to want to sell the vessel to the Government whether he had other people seeking it, or not.

Mr. CASSELL.—I do not desire to offer anything further in face of your Honor's ruling, but I want to show that the parties were acting in absolutely good faith, and that they actually did have prospects of selling the vessel.

The COURT.—You don't have to show good faith in that regard.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiff's Exception No. 3."

18.

The Court erred in sustaining respondent's objection to the offer by plaintiffs of that certain contract

dated September 15, 1911, wherein one W. S. Scammell agreed to purchase said steamer "Homer" in the event that the United States Government should not exercise its option, and, in accordance with the terms of which said agreement, said Scammell deposited one thousand (1,000) dollars as the first payment on account of the purchase price thereof, said payment to be returned in the event of the exercise by the United States Government of its said option, which said objection is more particularly shown by Plaintiffs' Exception No. 5.

19.

The Court erred in sustaining respondent's objection to a question propounded to the witness, John D. McKee, covered [125] by Plaintiffs' Exception No. 6, as follows:

"Mr. CASSELL.—Q. Was it the belief of yourself, at that meeting and at all times thereafter during the months of September and October, 1911, that that charter had been extended by those telegrams?

Mr. THOMAS.—I desire to object to that question, your Honor, upon the ground that the belief of Mr. McKee is in no wise binding upon the defendant.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 6."

20.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J.

Homer Fritch, as shown by Plaintiffs' Exception No. 7, as follows:

"Q. Was that new boiler installed by you solely in the expectation of chartering the 'Homer' for the season or with the expectation of selling the 'Homer' to the Government?

A. I guess it was a little of both; I can't say that it was.

Mr. THOMAS.—I desire to object to that question and ask that the answer be stricken out on the ground that it calls for a conclusion of the witness. [126]

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 7."

21.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs Exception No. 8, as follows:

"Mr. CASSELL.—Q. Mr. Fritch, would you have installed a new boiler on the 'Homer' if you had not been in the expectation of selling the 'Homer' to the Government. As its managing owner would you have expended the sum of eight thousand dollars in the installing of a new boiler in the 'Homer' if you had not been in the expectation of selling the 'Homer' to the Government?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's

said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 8."

22.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 9, as follows:

"Q. Mr. Fritch, you will recall that clause 21 of the charter-party, which is embodied in the agreed statement of facts in this action, read as follows: [127] 'That the Charterers have the option, at any time during this Charter, of purchasing the said vessel for the sum of forty-five thousand (\$45,000.00) Dollars, against which any amount paid for the hire of the said Vessel, less cost of operation, shall be set off and deducted, but that the Purchasers shall pay interest at the rate of 6% per annum and insurance on the amount of purchase money from the date of this Charter to the completion of sale.' In other words, under the charter-party which you subsequently made with the Government, the Government had the right at any time during the charter to purchase the 'Homer' from you for \$45,000, allowing the amount in part payment of whatever the Government paid to you as hire for the summer of 1911. Will you state whether or not it was your expectation in inserting that clause in the contract that the Government would be able to pay cash for the balance due on the purchase

price of the 'Homer' at the expiration of the summer after the amount of hire had been paid for the summer months by the Government.

Mr. THOMAS.—I object to that question on the ground that it calls for the conclusion of the witness as to what his expectation was.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and [128] plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 9."

23.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 10, as follows:

"Mr. CASSELL.—Q. Mr. Fritch, I will ask you if in granting the Government an option to purchase the 'Homer' by this 21st clause of the charter-party, you had in mind the representation made to you in the two letters to which I have referred, namely, the letters of December 2d, 1910, and December 15th, 1910, to the effect that the Department of Commerce and Labor would have a fund sufficient to pay for the balance of the purchase price of the 'Homer' after it had paid the amount of hire for the summer months.

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 10."

24.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 11, as follows:

"Mr. CASSELL.—Q. Mr. Fritch, I ask you if you would have granted the Government this option to purchase [129] the 'Homer' had you not believed that the Department of Commerce and Labor had a fund sufficient to pay for the 'Homer,' as stated in these letters.

Mr. THOMAS.—I object to that question on the ground that it calls for the opinion or conclusion of the witness.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 11."

25.

The Court erred in granting the motion by respondent to strike out certain answers to questions propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 12, as follows:

"Mr. CASSELL.—Q. Did you believe that they had a fund of \$20,000 available?

A. Yes; I am pretty sure they had it.

Q. And did you believe they had this fund of \$20,000 referred to in the letters of December 2d, 1910, and December 15th, 1910, to which I have referred? A. Yes.

Counsel for respondent thereupon moved to strike out the answers to the foregoing ques-

tions upon the same grounds as those specified in the last exception.

The Court thereupon [130] sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiff's Exception No. 12."

26.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 13, as follows:

"Q. Did Lembkey say to you whether or not he believed that the charter had been extended by the Government?

Mr. THOMAS.—Object to the question on the ground that Lembkey's statement would not be binding on the Government in any event.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiff's Exception No. 13".

27.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 14, as follows:

"Q. Do you remember whether during the month of September, 1911, you received any offer from anyone other than the Government to purchase the Steamer 'Homer'?

Mr. THOMAS.—We object to that question

as incompetent, irrelevant and immaterial.
[131]

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 14."

28.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 15, as follows:

"Mr. CASSELL.—Q. Were negotiations pending during the month of September with other parties than the Department of Commerce and Labor in which you were looking towards the sale of the Steamer 'Homer' to such parties in the event that the Government did not exercise its option?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiff's Exception No. 15."

29.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 16, as follows:

"Mr. CASSELL.—Q. Did those negotiations subsequently go through when the Government failed to exercise its option?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's

[132] said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiff's Exception No. 16."

30.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 17, as follows:

"Mr. CASSELL.—Q. Mr. Fritch, after you received that telegram of September 12th from the Department and after Mr. Lembkey endorsed that extension on the copy of the charter-party to which we referred, and after you sent the telegram on the 14th, did you or did you not suppose that the charter-party had been extended for another month?

Mr. THOMAS.—I object to that question on the ground it calls for the conclusion of the witness.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 17."

31.

The Court erred in sustaining respondent's objection to a question propounded to the witness, J. Homer Fritch, as shown by Plaintiffs' Exception No. 18, as follows:

"Mr. CASSELL.—Q. I am asking you for your belief. In putting the 'Homer' out at [133] the Oakland Creek, did you or did you not suppose that the charter had been extended

and that it was there for the use of the Government?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 18."

32.

The Court erred in overruling plaintiffs' objection to respondent's offer in evidence of a copy of an original appointment, dated May 10, 1910, of Walter I. Lembkey as Agent of the Seal Fisheries in Alaska, together with an enclosure which was attached to it, upon the ground that said Lembkey's authority was determined by the Federal Statutes, to wit, 1 Fed. Stats. Ann. 429; upon the further ground that said Lembkey was held out by the Department as its agent and as authorized to consummate transactions involved in this action; upon the further ground that no notice of any limitations of his authority was ever brought to the attention of plaintiffs; upon the further ground that upon its face the document did not show any limitation upon Lembkey's authority, so as to prevent him from binding the Department of Commerce and Labor, all of which is more particularly set forth in Plaintiffs' Exception No. 19. [134]

33.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 20.

34.

The Court erred in refusing to make a finding of

fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 21.

35.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 22.

36.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 23.

37.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 24.

38.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 25.

39.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 26.

40.

The Court erred in refusing to make a finding of [135] fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 27.

41.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 28.

42.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plain-

134 *J. Homer Fritch, Incorporated, et al.*
tiffs' Exception No. 29.

43.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 30.

44.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 31.

45.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 32.

46.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 33.

47.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 34. [136]

48.

The Court erred in refusing to make a finding of fact as requested by plaintiffs as set forth in Plaintiffs' Exception No. 35.

49.

The Court erred in overruling plaintiffs' objection to the Court's making the finding referred to in Plaintiffs' Exception No. 36.

50.

The Court erred in overruling plaintiffs' objection to the making of the finding referred to in Plaintiffs' Exception No. 37.

51.

The Court erred in overruling plaintiffs' objection to the making of the finding referred to in Plaintiffs' Exception No. 38.

WHEREFORE, Plaintiffs in Error herein pray that the judgment of the above-entitled court be reversed in so far as it adjudged that plaintiffs take nothing by the second count of their said complaint.

Dated San Francisco, California, November 15th, 1915.

IRA A. CAMPBELL,

Attorney for said Plaintiffs in Error.

[Endorsed]: Filed Nov. 15, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [137]

In the District Court of the United States, in and for the Northern District of California, Second Division.

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Respondent.

Order Allowing Writ of Error.

Upon motion of Ira A. Campbell, Esquire, attor-

ney for the above-named petitioners and plaintiffs, and upon filing a petition for a writ of error,

IT IS ORDERED that a writ of error be, and it is hereby, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit that portion of the judgment heretofore entered herein wherein it is ordered, adjudged and decreed that plaintiffs take nothing by the second count contained in the petition on file herein, and that the amount of bond on said writ of error be and the same is hereby fixed at two hundred fifty (250) dollars.

Dated November 15th, 1915.

WM. C. VAN FLEET,
Judge of Said Court.

[Endorsed]: Filed Nov. 15, 1915, W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[138]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECELIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Respondent.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That the undersigned, Massachusetts Bonding and Insurance Company, a corporation, created, organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, and duly authorized to transact business in the State of California, and fully qualified before the department of justice to execute bonds and undertakings in any and all Federal courts of the United States of America, is held and firmly bound unto the defendant and respondent herein, United States of America, in the full and just sum of two hundred and fifty (250) dollars to be paid to said defendant and respondent, to which payment well and truly to be made the undersigned binds itself and its successors by these presents.

SEALED with our seals and dated this 15th day of November, 1915. [139]

WHEREAS, J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, the above-named petitioners and plaintiffs, have sued out a writ of error in the United States Circuit Court of Appeals in and for the Ninth Circuit to reverse that portion of the judgment entered in the above-entitled action wherein it is ordered, adjudged and decreed that said petitioners and plaintiffs take nothing by the second count contained in the petition or complaint on file in said action.

NOW, THEREFORE, the condition of this obligation is such that if said plaintiffs and petitioners shall prosecute such a writ of error to effect, and answer all damages and costs if they shall fail to make good said plea, then this obligation shall be void; otherwise to remain in full force and virtue.

IN WITNESS WHEREOF, the Massachusetts Bonding and Insurance Company, a corporation, has hereunto caused its corporate name to be signed and attested, and its corporate seal to be affixed by its duly authorized officers at San Francisco, California, this 15th day of November, 1915.

MASSACHUSETTS BONDING AND INSURANCE COMPANY,

By FRANK M. HALL,
Its Attorney-in-Fact.

[Seal]

By S. W. PALMER,
Its Attorney-in-Fact.

The foregoing bond is hereby approved this 15th day of November, 1915.

WM. C. VAN FLEET,
United States District Judge. [140]

[Endorsed]: Filed Nov. 15, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[141]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECELIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondent.

Praeipice for Transcript of Record.

The clerk of the above-entitled court will please prepare a transcript of the record for the Appellate Court in the above-entitled cause, and is hereby directed to insert therein the following:

1. The petition or complaint;
2. The affidavit of service with summons attached;
3. The amended answer of defendant;
4. The stipulation and agreed statement of facts;
5. Stipulation waiving jury;
6. Special findings of fact;
7. Judgment;
8. Plaintiffs' bill of exceptions; [142]
9. All stipulations and orders extending time for settlement of findings;
10. All papers filed by plaintiffs herein in the prosecution of its writ of error, including

140 *J. Homer Fritch, Incorporated, et al.*

petition for the writ of error, assignment of errors, order allowing writ of error, writ of error, citation upon writ of error, and bond on writ of error.

Dated San Francisco, California, November 15th, 1915.

IRA A. CAMPBELL,
Attorney for Plaintiffs.

[Endorsed]: Filed Nov. 15, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[143]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECILIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES,

Respondents.

I, Walter B. Maling, Clerk of the District Court of the United States of America, in and for the Northern District of California, do hereby certify that the foregoing one hundred forty-three (143)

pages, numbered from 1 to 143, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, in conformity with the praecipe for record filed herein, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ is \$76.60; that said amount was paid by Ira A. Campbell, Esq., attorney for plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 17th day of November, A. D. 1915.

[Seal]

WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
Nov. 17, 1915. J. A. S.] [144]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Corporation,
E. T. KRUSE, MARY BELL PARKER BURNS,
CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Respondent.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said District Court before you, or some of you, between J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, petitioners and plaintiffs, and United States of America, defendant and respondent, a manifest error hath happened to the great damage of the said J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker

Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, petitioners and plaintiffs, as by said complaint appears, and we being willing that error, if any hath been, [145] should be duly corrected, and full and just justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same at the City and County of San Francisco, in the State of California, on the 15th day of December, A. D. 1915, in the Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 15th day of Nov., in the year of our Lord one thousand nine hundred and fifteen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern
District of California.

By J. A. Schaertzer,
Deputy Clerk.

Due admission of service and receipt of copy of the within writ of error is hereby acknowledged

144 *J. Homer Fritch, Incorporated, et al.*

this 16th day of November, 1915.

JNO. W. PRESTON,

M. A. THOMAS,

Attorneys for Respondent. [146]

[Endorsed]: No. 15,599. In the District Court of the United States, Second Division, Northern District of California. *J. Homer Fritch, Incorporated, a Corporation, et al.,* Petitioners and Plaintiffs, vs. *United States of America,* Respondent. Writ of Error. Filed Nov. 16, 1915. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Answer to Writ of Error.]

The answer of the Judges of the District Court of the United States, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are com-
manded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

By J. A. Schaertzer,

Deputy Clerk. [147]

*In the District Court of the United States, in and
for the Northern District of California, Second
Division.*

No. 15,599.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECELIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Petitioners and Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Respondent.

Citation of Writ of Error.

To the President of the United States of America,
to the United States of America, and to Attor-
ney General, and John W. Preston, United
States Attorney General for the Northern Dis-
trict of California, and to M. A. Thomas, Es-
quire, Assistant United States Attorney for the
Northern District of California, Greeting:

YOU AND EACH OF YOU ARE HEREBY
cited and admonished to be and appear in the Cir-
cuit Court of Appeals for the Ninth Circuit at the
City and County of San Francisco, State of Cali-
fornia, within thirty days from and after the date
this citation bears, pursuant to a writ of error filed
in the District Court for the Northern District of
California, Second Division, in the above-entitled
cause whereas J. Homer Fritch, Incorporated, a cor-
poration, E. T. Kruse, Mary Bell Parker Burns,

Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, are plaintiffs and petitioners, and the United States of America, is defendant and respondent, to show cause, if any there be, why that portion of the judgment [148] heretofore made and rendered in the above-entitled cause on the 5th day of Nov., 1915, wherein it is ordered, adjudged and decreed that said plaintiff take nothing by the second count contained in the petition or complaint on file herein should not be corrected and reversed and why justice should not be done to the parties in that behalf.

WITNESS the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this 15th day of Nov., 1915.

WM. C. VAN FLEET,
United States District Judge for the Northern District of California.

Due admission of service and receipt of copy is hereby acknowledged of the within citation and also of the following (1) writ of error; (2) petition for writ of error; (3) bond on writ of error; assignment of errors; order allowing writ of error; praecipe for transcript of record.

San Francisco, California, November 16th, 1915.

JNO. W. PRESTON,

M. A. THOMAS,

Attorneys for Respondent.

Attorneys for Respondent. [149]

[Endorsed]: No. 15,599. In the District Court of the United States, Second Division, Northern District of California. J. Homer Fritch, Incor-

porated, a corporation, et al., Petitioners and Plaintiffs, vs. United States of America, Respondent. Citation of Writ of Error. Filed Nov. 16, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2683. United States Circuit Court of Appeals for the Ninth Circuit. J. Homer Fritch, Incorporated, a Corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division. Filed November 17, 1915. F. D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

[Endorsed]: Printed Transcript of Record. Filed Dec. 2, 1915. F. D. Monckton, Clerk.



United States
Circuit Court of Appeals

For the Ninth Circuit.

**J. HOMER FRITCH, INCORPORATED, a Corpora-
tion, E. T. KRUSE, MARY BELL PARKER
BURNS, CECELIA SUDDEN, JAMES HOGG,
JAMES P. TAYLOR and KATE E. SPIERS,**

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

**Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**



At a stated term, to wit, the October Term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Thursday the twenty-third day of March, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2683.

J. HOMER FRITCH, INCORPORATED, a Corporation, et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Order of Submission.

ORDERED, above-entitled cause argued by Mr. John F. Cassell, counsel for the plaintiffs in error, Mr. Assistant United States Attorney, M. A. Thomas, counsel for the defendant in error, appearing and submitting the case on the brief of defendant in error on file, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1915, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the tenth day of July, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge; Honorable MAURICE T. DOOLING, District Judge.

No. 2683.

J. HOMER FRITCH, INCORPORATED, a Corporation, et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Order Directing Filing of Opinion and Filing and Recording of Judgment.

By direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the cause was heard, **ORDERED** that the typewritten opinion rendered by this Court in the above-entitled cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with said opinion.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

**J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECELIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,**

Plaintiffs in Error,

vs.

**THE UNITED STATES OF AMERICA,
Defendant in Error.**

Opinion, U. S. Circuit Court of Appeals.

**IRA A. CAMPBELL, for the Plaintiffs in
Error.**

**JOHN W. PRESTON, United States Attorney,
and M. A. THOMAS, Assistant United
States Attorney, for the Defendant in
Error.**

**Before GILBERT, ROSS and HUNT, Circuit
Judges.**

The plaintiffs in error were the owners of the steamer "Homer." For several years prior to 1911 the Department of Commerce and Labor had chartered the steamer for three or four months in the summer of each year for use in connection with the Alaska seal fisheries. Bowers, the Commissioner of Fisheries, and Lembkey, the agent of the Department of Commerce and Labor for the Alaska seal fisheries, recognizing the fitness of the

"Homer" for their purposes, desired to purchase her, and they entered into negotiations with the owners with that end in view. The negotiations failed for the reason that the Department had but a fund of \$20,000 available for purchasing, and the purchase price was \$45,000. In the charter-party for 1911 there was inserted in paragraph 21, "That the charterers have the option, at any time during this charter, of purchasing the said vessel for the sum of forty-five thousand (\$45,000) dollars, against which any amount paid for the hire of the said vessel, less cost of operation, shall be set off and deducted, but that the purchasers shall pay interest at the rate of 6% per annum (and insurance) on the amount of purchase money from the date of this charter to the completion of sale." The charter-party was entered into on April 24, 1911, and was for a period of 3½ months with the option to extend the same 30 days. The owners were to furnish all officers, seamen, engineers and firemen, but the charterer had the right to appoint a supercargo. On September 12, 1911, the steamer was at San Francisco ready to be surrendered to the owners, and the owners were notified that the voyage was terminated, that the cargo had been discharged, and that at 12 o'clock noon of that day the vessel would be turned over to them. But at 10:30 A. M. of that day the owners received from Washington the following telegram of that date: "Would like to have option for purchase of 'Homer' extended thirty days on terms mentioned in Paragraph twenty-one of charter, otherwise charter to terminate as pro-

vided therein answer. Chas. Earl, Acting Secretary of the Department of Commerce and Labor." The agent of the owners on receipt of the telegram conferred with Lembkey, who was at San Francisco, and Lembkey endorsed the following on the charter-party agreement: "According to telegram of September 12th received from Mr. Chas. Earl, Acting Secretary, Department of Commerce & Labor, this Charter is hereby extended for a period of 30 days from September 13th, 1911. Subject to approval of Dept. of Commerce & Labor." On September 14, the owners sent the following telegram to the Acting Secretary of the Department of Commerce and Labor at Washington: "As requested in your telegram of twelfth instant charter steamer 'Homer' hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase." On October 10, 1911, the owners sent the following telegram to Bowers, Commissioner of Fisheries at Washington: "Your extension of charter and option of Steamer 'Homer' expires October 13th. Should this expire without further action on the part of the Department ship will go to holder of second option upon which one thousand dollars has been paid. Should you indicate that you wish to exercise your option, terms of payment can be satisfactorily arranged without doubt. Kindly wire your wishes in the premises." On October 12, the Acting Commissioner of Fisheries answered the dispatch saying, "Replying yours Oct. ten, Bureau of Fisheries is not in position to purchase Homer." On October 25, the Acting Secre-

tary of Commerce and Labor wrote to the owner as follows: "Replying to your letter of the 14th instant, enclosing duplicate bills for charter of the steamship 'Homer' from September 1 to October 13, 1911, inclusive, you are informed that the vessel was discharged and relinquished to her owners on September 12 noon and that the Department has not extended or renewed the charter nor approved the action of any officer of the Department attempting to bind it for charter money beyond that time." The correspondence explains the issues on which the case was tried in the court below. There was a stipulation of facts and some oral testimony was taken on behalf of the plaintiffs, but they add nothing material to what has been stated. The Court made the following findings of fact: "First, that the steamship 'Homer' was fully discharged of her cargo and turned over to the owners by the charterers, on or prior to the 12th day of September, 1911, at the port of San Francisco, California. Second, that W. I. Lembkey did not have authority to extend the charter-party beyond the 12th day of September, 1911, and his attempted extension thereof was not ratified or approved by the Department of Commerce and Labor, or by any department or agent of the defendant. Third, that there was no contract or agreement between plaintiff and the defendant extending the charter-party beyond September 12, 1911."

GILBERT, Circuit Judge, after stating the case:

Each party to the action claims that its respective contention is sustained by the language of the tele-

gram of September 12, 1911: "Would like to have option for purchase of 'Homer' extended thirty days on terms mentioned in paragraph twenty-one of charter otherwise charter to terminate as provided therein answer." The defendant claims that it distinctly called for extension of the option to purchase and for nothing else. The plaintiffs claim it meant extension of both the charter-party and the option to purchase because the charter-party included the option to purchase and there had been an understanding that all moneys paid on the charter, less cost of operation, should be credited on the purchase price of the vessel, and that this meaning is made certain by the words, "otherwise charter to terminate as provided therein," which words, it is said, indicate that if the option were extended, the charter was not to terminate, and that the whole dispatch means this: "Would like to have option for purchase extended thirty days; if you do not consent the charter shall terminate as provided therein." But counsel for the defendant say that the meaning of the word "otherwise" as used in the telegram is "in other respects," and that the dispatch means "would like to have option for purchase extended thirty days; in other respects the charter to terminate as provided therein." If that was the message intended to be conveyed, the word "otherwise" was unfortunately chosen. That meaning, it seems to us, is not suggested by the other words of the telegram, and is not the natural meaning. However if the case rested there, and there were no more to the correspondence than a telegram accepting

the proposition of the Acting Secretary, we should hold that the minds of the parties never met upon the understanding which the plaintiffs gave to the dispatch. But the dispatch called for an answer, and two days later the answer was sent: "As requested in your telegram of twelfth instant, charter steamer 'Homer' hereby extended for further period of thirty days from September thirteenth nineteen eleven, with option of purchase." That telegram distinctly advised the Acting Secretary that his proposition of September 12th was understood to be a proposition to extend both the charter and the option to purchase. If he did not assent to that interpretation of his proposal, it was his duty then to disclaim it. This he did not do, and it was not until October 25th that he wrote to the owners informing them that the Department had not extended or renewed the charter, nor approved the action of any officer of the Department attempting to bind it for charter money beyond September 12th.

We know of no reason why the parties to this charter-party should not be bound by the ordinary rules which control contracts of private parties. In the correspondence the Department of Commerce and Labor was not represented by subordinates. It was represented by the Acting Secretary himself. He it was, according to the record, who sent the proposal of the 12th, in which he asked for an answer, and we must assume that two days later he received the answer and was fully apprised of its contents.

But the ground upon which a party will be held to that meaning which he knows the other party has

placed upon his proposal is equitable estoppel. It rests upon the fact that the other party, relying in good faith upon his silence or acquiescence, has been induced thereby to change his position for the worse, or has acquired some corresponding right, either of property, of contract or of remedy. The *Alberto*, 24 Fed. 379; Pom. Eq. Jur., sec. 805. In the present case there is a total absence of showing that the plaintiffs did anything in reliance upon the silence of the Secretary or upon their understanding of the contract. On September 12, 1911, the steamer was in Oakland Creek, and there it remained during the period of the extension of the option. There is no evidence that the plaintiffs would have chartered it or used it or would have done otherwise with it than they did but for the option.

The judgment is affirmed.

[Endorsed]: Opinion. Filed Jul. 10, 1916. F. D. Monckton, Clerk.

*United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 2683.

J. HOMER FRITCH, INCORPORATED, a Corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Judgment, U. S. Circuit Court of Appeals.

In error to the District Court of the United States for the Northern District of California, Second Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Second Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed.

[Endorsed]: Judgment. Filed and entered July 10, 1916. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixteenth day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2683.

J. HOMER FRITCH, INCORPORATED, a Corporation, et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Order Directing Filing of Opinion on Petition for a Rehearing, etc.

ORDERED, that the typewritten Opinion this day rendered by this Court in the above-entitled cause on the Petition for a Rehearing, be forthwith filed by the clerk, and that an order be entered in the minutes of this Court, in accordance with said Opinion.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 2683.

J. HOMER FRITCH, INCORPORATED, a Corporation,
E. T. KRUSE, MARY BELL PARKER BURNS,
CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

**Opinion, U. S. Circuit Court of Appeals, on Petition
for Rehearing.**

ON PETITION FOR REHEARING.

Before GILBERT, ROSS and HUNT, Circuit
Judges.

GILBERT, Circuit Judge:

The plaintiffs complain of the conclusion of this Court that there is "no evidence that the plaintiffs would have chartered the vessel or used it, or would have done otherwise with it than they did but for the option." It is earnestly insisted that the court below excluded evidence proffered by the plaintiffs which if admitted would have shown that this conclusion is incorrect. They point to the ruling of the court below on the question propounded by the plaintiffs: "Will you state what was the nature of the negotiations you then had pending for the sale

of the 'Homer' to other parties in the event that the sale to the Government did not go through?" This was offered "to show that the parties were acting in absolutely good faith, and that they actually did have prospects of selling the vessel." The court below ruled that they were not required to show good faith, and excluded the offered testimony. Again the plaintiffs offered in evidence a "memorandum" of date September 15, 1911, which was an option in which in consideration of \$1,000 paid by the holder thereof he was given the right to purchase the steamer within fifteen days after the expiration of the Government's option on paying therefor \$7,000 in cash and executing notes for \$27,000, the notes to draw interest at six per cent. The option further provided that if the purchase was not completed within fifteen days after notice of the Government's failure to exercise its option, the \$1,000 payment should be forfeited to the plaintiffs. It is said that the evidence so offered, if admitted, would have shown that the plaintiffs were deprived of the interest on \$34,000 for thirty days, and were, therefore, injured in that amount. But the plaintiffs offered no proof that the option to purchase was ever carried out, or that the proposed purchasers would, but for the Government's option, have entered into an immediate contract of purchase, and although the plaintiffs offered evidence that during the month of September it had negotiations with other parties looking toward the sale of the steamer, it did not show or offer to produce any specific evidence that those negotiations would have resulted

in a sale, or that the plaintiffs were in any way injured by its reliance upon the understanding that the charter was extended. In short, it is clear that it was the Government's option to purchase, which admittedly was extended, which primarily prevented any immediate sale of the steamer, and until that option expired the plaintiffs were powerless to sell, and that the supposed extension of the charter added nothing to the other obstacle which stood in the way of the sale.

We entertain no doubt of the correctness of our view that the plaintiffs here could only recover in an action upon a showing that relying on their understanding of the contract, and the defendant's acquiescence therein, they suffered loss by changing their position to their injury. The rule that the Government is not estopped by the acts of its agents or officers applies only where such acts were fraudulent, unauthorized or mistaken. *Pine River Logging Co. v. United States*, 186 U. S. 279; *Whiteside v. United States*, 93 U. S. 247, 256. In this case the Secretary of Commerce and Labor was apparently acting within the scope of his authority. The rules governing the construction and operation of contracts generally apply to contracts entered into by the Government. 39 Cyc. 742. In *United States v. Stinson*, 197 U. S. 201, the Court said: "The Government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact,

that attend the prosecution of a like action by an individual."

The petition is denied.

[Endorsed]: Opinion on Petition for Rehearing.
Filed Oct. 16, 1916. F. D. Monckton, Clerk.

At a stated term, to wit, the October term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the sixteenth day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2683.

J. HOMER FRITCH, INCORPORATED, a Corporation, et al.,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Order Denying Petition for a Rehearing.

Agreeably to the Opinion this day filed in the above-entitled cause, it is hereby ORDERED that the Petition, filed July 28, 1916, on behalf of the plaintiffs in error, for a rehearing of the above-entitled cause be, and hereby is denied.

At a stated term, to wit, the October term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the eighteenth day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

No. 2683.

J. HOMER FRITCH, INCORPORATED, et al.,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Order Staying Issuance of Mandate.

On motion of John F. Cassell, counsel for the plaintiffs in error, and good cause therefor appearing, ORDERED, issuance of Mandate under rule 32 of this court in the above-entitled cause stayed for a period of sixty (60) days from date.

*United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 2683.

J. HOMER FRITCH, INCORPORATED, a Corporation,
E. T. KRUSE, MARY BELL PARKER BURNS,
CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Petition for Order Allowing Writ of Error.

The above-named plaintiffs in error, J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, respectfully show:

That the above-entitled cause is now pending in the United States Circuit Court of Appeals for the Ninth Circuit and that a judgment and decree therein was made and entered on the 10th day of July, 1916, affirming the judgment of the District Court of the United States for the Northern District of California, Second Division, and particularly a certain portion of said judgment wherein and whereby it was ordered, adjudged and decreed that said plaintiffs in error (plaintiffs in said District Court) take nothing by their second count contained in their pe-

tition or complaint filed in the said District Court; and that the matter in controversy in said case exceeds one thousand (1,000) dollars, besides costs, and that the amount in controversy in said case in fact exceeds three thousand (3,000) dollars, and is the sum of four thousand four hundred and eighty-eight and 75/100 (4,488.75) dollars, besides costs; and that the jurisdiction of none of the courts above mentioned is or was dependent in anywise upon the opposite parties to the suit or controversy being aliens or citizens of the United States or citizens of different states; and that this cause does not arise under the patent laws, nor under the copyright laws, nor under the revenue laws, nor under the criminal laws, and that it is not an admiralty case; and that said judgment of said Circuit Court of Appeals for the Ninth Circuit was rendered upon a writ of error in an action instituted by plaintiffs in error in said District Court of the United States for the Northern District of California, Second Division, pursuant to the twentieth subdivision of Section 24 of the Act of Congress of the United States of America entitled, "An Act to Codify, Revise and Amend the Laws Relating to the Judiciary," approved March 3, 1911; and that said judgment of said United States Circuit Court of Appeals for the Ninth Circuit is not made final by the provisions of said last-mentioned Act of Congress, or by any amendments thereto, and that plaintiffs in error are entitled to said writ of error from the said Supreme Court of the United States to said United States Circuit Court of Appeals for the Ninth Circuit un-

der the provisions of Sections 241 and 242 of said Act.

WHEREFORE, said plaintiffs in error deeming themselves aggrieved by the said judgment of said United States Circuit Court of Appeals for the Ninth Circuit, above referred to, come now, by Ira A. Campbell, their attorney, and petition the said United States Circuit Court of Appeals for the Ninth Circuit for an order allowing them to prosecute a writ of error and to have the same allowed and issued from the said Supreme Court of the United States to the said United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, in order that the errors complained of in the assignment of errors, herewith filed by said plaintiffs in error, may be reviewed, and, if error be found, that it may be corrected according to the laws and customs of the United States; and that the Clerk of said United States Circuit Court of Appeals for the Ninth Circuit be directed to send the records and proceedings in said cause with all things concerning the same to the Supreme Court of the United States; and also, that an order may be made fixing the amount of the cost bond which said plaintiffs in error shall give and furnish upon this writ of error; and that upon the filing of such bond all proceedings in said cause in the United States Circuit Court of Appeals for the Ninth Circuit and in the District Court of the United States for the Northern District of Califor-

nia, Second Division, be suspended and stayed until the determination of such writ of error by the said Supreme Court of the United States.

And your petitioners will ever pray.

IRA A. CAMPBELL,
Attorney for Said Petitioners.

State and Northern District of California,
City and County of San Francisco,—ss.

Ira A. Campbell, being first duly sworn, deposes and says:

That he is an attorney at law and is authorized by plaintiffs in error herein to make, and does make, this affidavit in their behalf; that he has read the foregoing petition, knows its contents, and that the matters and things therein set forth are true of his own knowledge, and, in particular, affiant states that the amount involved in said cause, exclusive of costs, exceeds the value of three thousand (3,000) dollars, and that the amount involved is, in fact, exclusive of costs, the sum of four thousand four hundred and forty-eight and 75/100 (4,448.75) dollars.

IRA A. CAMPBELL.

Subscribed and sworn to before me this 19th day
of October, 1916.

[Seal] FRANK L. OWEN,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Petition for Order Allowing Writ of Error. Filed Oct. 19, 1916. F. D. Monckton, Clerk.
Service of the within Petition for Writ of Error

and receipt of a copy is hereby admitted this 19th day of October, 1916.

JNO. W. PRESTON,
U. S. Attorney.

*United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 2683.

J. HOMER FRITCH, INCORPORATED, a Corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Assignment of Errors.

Now come J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, plaintiffs in error herein, by Ira A. Campbell, their attorney, and make and file the following assignment of errors, upon which they will rely in the prosecution of their writ of error from the Supreme Court of the United States in the above-entitled cause:

1. The United States Circuit Court of Appeals for the Ninth Circuit erred in affirming the judgment of the District Court of the United States for the Northern District of California, Second Division, and

particularly that portion of said judgment wherein it was adjudged and decreed that plaintiffs in error (plaintiffs in said District Court) take nothing by the second count in their complaint contained, for the reason that said judgment, and particularly said portion of said judgment, was and is contrary to the evidence and the law.

2. Said Court erred in holding and determining that the charter of the steamer "Homer," dated April 24, 1911, was not extended by the respective parties thereto for a further period of thirty (30) days from and after the 13th day of September, 1911.

3. Said Court erred in holding and determining that the United States of America did not become liable to plaintiffs in error for the charter hire of the steamer "Homer" for a period of thirty days from and after the 13th day of September, 1911.

4. Said Court erred in holding and determining that the ground upon which a party will be held to that meaning of an ambiguous contract which he knew the other party has placed upon it is equitable estoppel.

5. Said Court erred in refusing to hold that the United States was bound by that construction of the telegram of September 12, 1911, which was placed upon it by the telegram from plaintiffs in error to the Department of Commerce and Labor, dated September 14, 1911, upon the ground that where there is ambiguity in a contract and one party notifies the other of the interpretation which he places upon it, and the party so notified does not object to such interpretation, the latter will be bound thereby.

6. Said Court erred in holding and determining that plaintiffs in error did not change their position for the worse in reliance upon the failure of the Department of Commerce and Labor to reply to the telegram of September 14, 1911, or to otherwise notify plaintiffs in error of its dissent from the construction therein placed upon the telegram of September 12, 1911, by plaintiffs in error.

7. Said Court erred in refusing to hold that the telegram of September 12, 1911, was an offer to extend the charter of April 24, 1911, as well as the option contained therein, and not the option alone, upon the ground that where an instrument in writing is ambiguous and susceptible of two meanings, it will be given that meaning which is least favorable to the party drawing it, it being an admitted fact that the Department of Commerce and Labor, and not the plaintiffs in error, drew the said telegram of September 12, 1911.

8. Said Court erred in refusing to hold that upon its face the telegram of September 12, 1911, constituted and was an offer upon the part of the Department of Commerce and Labor to extend the charter of April 24, 1911, as well as the option contained therein.

9. Said Court erred in refusing to hold, in view of all of the uncontradicted evidence, that the telegram of September 12, 1911, constituted an offer on the part of the Department of Commerce and Labor to extend the charter of April 24, 1911, as well as the option contained therein.

10. Said Court erred in holding and determining

that the telegram of September 12, 1911, constituted an offer upon the part of the Department of Commerce and Labor to extend only the option contained in the charter of April 24, 1911, and not the charter itself, for the reason that the evidence was insufficient to support such a holding.

11. Said Court erred in refusing to hold that the word "otherwise," contained in the telegram of September 12, 1911, was susceptible of but one meaning, which was that if the offer of the Department of Commerce and Labor contained in said telegram was accepted by plaintiffs in error the charter of April 24, 1911, was to be extended for a further period of thirty days.

12. Said Court erred in refusing to hold, as a matter of law, that said telegram of September 12, 1911, constituted an express offer on the part of the Department of Commerce and Labor to extend the charter of April 24, 1911, for a further period of thirty days, because said telegram expressly offered to extend the option for the purchase of the "Homer" "on terms mentioned in paragraph 21 of the charter" (of April 24, 1911), and because said paragraph 21 of said charter expressly provided that the charterers might purchase "at any time during this charter."

13. Said Court erred in refusing to reverse the judgment of said District Court and to send the case back for a new trial, because it conclusively appeared that said District Court decided the case upon an altogether different theory from that upon which it was decided by said United States Circuit Court of

Appeals for the Ninth Circuit and by its rulings on evidence during the course of the trial, which were duly excepted to and assigned as error, prevented plaintiffs in error from making any showing whatever upon issues which were held by said Circuit Court of Appeals to be of controlling importance.

14. Said Court erred in refusing to sustain each and every of plaintiffs in error's assignments of error from one (1) to fifty-one (51), inclusive, relied upon by plaintiffs in error in the prosecution of their writ of error from said United States Circuit Court of Appeals for the Ninth Circuit to said District Court of the United States for the Northern District of California, Second Division.

15. Said Court erred in refusing to reverse the judgment of the District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness John D. McKee, covered by Plaintiff's Exception No. 1, as follows:

"Q. Did Mr. Lembkey state, in your presence and in the presence of Mr. Fritch at that time, what he believed the reason of the Government to be for wanting the charter extended a period of 30 days? — A. Yes, sir.

Q. State what that was.

Mr. THOMAS.—I object to that, if your Honor please; it is not shown that any statement Mr. Lembkey would make would be binding upon the Government in this matter.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and

plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 1."

16. Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness John D. McKee, covered by Plaintiffs' Exception No. 2 as follows:

"Mr. CASSELL.—Q. Will you state what was said by Mr. Lembkey at the time with regard to the purpose of the Department in desiring to extend the charter-party for 30 days?

Mr. THOMAS.—We object to that, if your Honor please, upon the ground that the charter-party shows upon its face that anything Lembkey did was subject to the approval of the Department, and that Lembkey's private conversations with these gentlemen or his statements to them are in no way binding upon the Government.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 2."

17. Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness John D. McKee, covered by Plaintiffs' Exception No. 3, as follows:

“Mr. CASSELL.—Q. Will you state what was the nature of the negotiations you then had pending for the sale of the ‘Homer’ to other parties in the event that the sale to the Government did not go through in accordance with the terms of the provisions of clause 21 of the charter-party.

Mr. THOMAS.—We object to the question, if your Honor please, upon the ground that the answer would be immaterial, irrelevant and incompetent, and it would have no bearing at all on this case.

The COURT.—He has stated that there were negotiations and that is all that is material; the specific nature of them is not material. The objection is sustained. The fact is, Mr. Cassell, I do not think it is material whether he had other negotiations. He had a right to want to sell the vessel to the Government whether he had other people seeking it, or not.

Mr. CASSELL.—I do not desire to offer anything further in face of your Honor’s ruling, but I want to show that the parties were acting in absolutely good faith, and that they actually did have prospects of selling the vessel.

The COURT.—You don’t have to show good faith in that regard.

The Court thereupon sustained respondent’s said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs’ Exception No. 3.”

18. Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to the offer by plaintiffs in error of that certain contract dated September 15, 1911, wherein one W. S. Scammell agreed to purchase said steamer "Homer" in the event that the United States Government should not exercise its option, and, in accordance with the terms of which said agreement, said Scammell deposited one thousand (1,000) dollars as the first payment on account of the purchase price thereof, said payment to be returned in the event of the exercise by the United States Government of its said option, which said objection is more particularly shown by Plaintiffs' Exception No. 5.

19. Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness John D. McKee, covered by Plaintiffs' Exception No. 6, as follows:

"Mr. CASSELL.—Q. Was it the belief of yourself, at that meeting, and at all times thereafter during the months of September and October, 1911, that that charter had been extended by those telegrams?

Mr. THOMAS.—I desire to object to that question, your Honor, upon the ground that the belief of Mr. McKee is in no wise binding upon the defendant.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and

plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 6."

20. Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness J. Homer Fritch, covered by Plaintiffs' Exception No. 7, as follows:

"Q. Was that new boiler installed by you solely in the expectation of chartering the 'Homer' for the season or with the expectation of selling the 'Homer' to the Government?

A. I guess it was a little of both; I can't say that it was.

Mr. THOMAS.—I desire to object to that question and ask that the answer be stricken out on the ground that it calls for a conclusion of the witness.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 7."

21. Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness, J. Homer Fritch, covered by Plaintiffs' Exception No. 8, as follows:

"Mr. CASSELL.—Q. Mr. Fritch, would you have installed a new boiler on the 'Homer' if you had not been in the expectation of selling

the 'Homer' to the Government? As its managing owner, would you have expended the sum of eight thousand dollars in the installing of a new boiler in the 'Homer' if you had not been in the expectation of selling the 'Homer' to the Government?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 8."

22. Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness J. Homer Fritch, covered by Plaintiffs' Exception No. 9, as follows:

"Q. Mr. Fritch, you will recall that clause 21 of the charter-party, which is embodied in the agreed statement of facts in this action, read as follows:

'That the Charterers have the option, at any time during this Charter, of purchasing the said vessel for the sum of forty-five thousand (\$45,000.00) Dollars, against which any amount paid for the hire of the said Vessel, less cost of operation, shall be set off and deducted, but that the Purchasers shall pay interest at the rate of 6% per annum and insurance on the amount of purchase money from the date of this Charter to the completion of sale.' In other words,

under the charter-party which you subsequently made with the Government, the Government had the right at any time during the charter to purchase the 'Homer' from you for \$45,000, allowing the amount in part payment of whatever the Government paid to you as hire for the summer of 1911. Will you state whether or not it was your expectation in inserting that clause in the contract that the Government would be able to pay cash for the balance due on the purchase price of the 'Homer' at the expiration of the summer after the amount of hire had been paid for the summer months by the Government?

Mr. THOMAS.—I object to that question on the ground that it calls for the conclusion of the witness as to what his expectation was.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 9."

23. Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness J. Homer Fritch, covered by Plaintiffs' Exception No. 10, as follows:

"Mr. CASSELL.—Q. Mr. Fritch, I will ask you if in granting the Government an option to purchase the 'Homer' by this 21st clause of the charter-party, you had in mind the representation made to you in the two letters to which I

have referred, namely, the letters of December 2d, 1910, and December 15th, 1910, to the effect that the Department of Commerce and Labor would have a fund sufficient to pay for the balance of the purchase price of the 'Homer' after it had paid the amount of hire for the summer months.

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 10."

24. Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness J. Homer Fritch, covered by Plaintiffs' Exception No. 11, as follows:

"Mr. CASSELL.—Q. Mr. Fritch, I ask you if you would have granted the Government this option to purchase the 'Homer' had you not believed that the Department of Commerce and Labor had a fund sufficient to pay for the 'Homer,' as stated in these letters.

Mr. THOMAS.—I object to that question on the ground that it calls for the opinion or conclusion of the witness.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 11."

25. Said Court erred in refusing to reverse the judgment of the said District Court for its error in granting the motion of the United States of America to strike out certain answers to questions propounded to the witness, J. Homer Fritch, covered by Plaintiffs' Exception No. 12, as follows:

"Mr. CASSELL.—Q. Did you believe that they had a fund of \$20,000 available?

A. Yes; I am pretty sure they had it.

Q. And did you believe they had this fund of \$20,000 referred to in the letters of December 2d, 1910, and December 15th, 1910, to which I have referred? A. Yes.

Counsel for respondent thereupon moved to strike out the answers to the foregoing questions upon the same grounds as those specified in the last exception.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 12."

26. Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness J. Homer Fritch, covered by Plaintiffs' Exception No. 13, as follows:

"Q. Did Lembkey say to you whether or not he believed that the charter had been extended by the Government?

Mr. THOMAS.—Object to the question on the ground that Lembkey's statement would not be binding on the Government in any event.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 13"

27. Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness J. Homer Fritch, covered by Plaintiffs' Exception No. 14, as follows:

"Q. Do you remember whether during the month of September, 1911, you received any offer from anyone other than the Government to purchase the Steamer 'Homer'?

Mr. THOMAS.—We object to that question as incompetent, irrelevant and immaterial.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 14."

28. Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness J. Homer Fritch, covered by Plaintiffs' Exception No. 15, as follows:

"Mr. CASSELL.—Q. Were negotiations pending during the month of September with other

parties than the Department of Commerce and Labor in which you were looking towards the sale of the Steamer 'Homer' to such parties in the event that the Government did not exercise its option?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 15."

29. Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness J. Homer Fritch, covered by Plaintiffs' Exception No. 16, as follows:

"Mr. CASSELL.—Q. Did those negotiations subsequently go through when the Government failed to exercise its option?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 16."

30. Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness J. Homer Fritch, covered by Plaintiffs' Exception No. 17, as follows:

“Mr. CASSELL.—Q. Mr. Fritch, after you received that telegram of September 12th from the Department and after Mr. Lembkey endorsed that extension on the copy of the charter-party to which we referred, and after you sent the telegram on the 14th, did you or did you not suppose that the charter-party had been extended for another month?

Mr. THOMAS.—I object to that question on the ground it calls for the conclusion of the witness.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 17.”

31. Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness J. Homer Fritch, covered by Plaintiffs' Exception No. 18, as follows:

“Mr. CASSELL.—Q. I am asking you for your belief. In putting the ‘Homer’ out at the Oakland Creek, did you or did you not suppose that the charter had been extended and that it was there for the use of the Government?

Mr. THOMAS.—Same objection.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 18.”

32. Said Court erred in refusing to reverse the judgment of the said District Court for its error in refusing to make a finding of fact as requested by plaintiffs in error as set forth in Plaintiffs' Exception No. 20.

33. Said Court erred in refusing to reverse the judgment of the said District Court for its error in refusing to make a finding of fact as requested by plaintiffs in error as set forth in Plaintiffs' Exception No. 21.

34. Said Court erred in refusing to reverse the judgment of the said District Court for its error in refusing to make a finding of fact as requested by plaintiffs in error as set forth in Plaintiffs' Exception No. 22.

35. Said Court erred in refusing to reverse the judgment of the said District Court for its error in refusing to make a finding of fact as requested by plaintiffs in error as set forth in Plaintiffs' Exception No. 23.

36. Said Court erred in refusing to reverse the judgment of the said District Court for its error in refusing to make a finding of fact as requested by plaintiffs in error as set forth in Plaintiffs' Exception No. 24.

37. Said Court erred in refusing to reverse the judgment of the said District Court for its error in refusing to make a finding of fact as requested by plaintiffs in error as set forth in Plaintiffs' Exception No. 25.

38. Said Court erred in refusing to reverse the judgment of the said District Court for its error in

refusing to make a finding of fact as requested by plaintiffs in error as set forth in Plaintiffs' Exception No. 26.

39. Said Court erred in refusing to reverse the judgment of the said District Court for its error in refusing to make a finding of fact as requested by plaintiffs in error as set forth in Plaintiffs' Exception No. 27.

40. Said Court erred in refusing to reverse the judgment of the said District Court for its error in refusing to make a finding of fact as requested by plaintiffs in error as set forth in Plaintiffs' Exception No. 28.

41. Said Court erred in refusing to reverse the judgment of the said District Court for its error in refusing to make a finding of fact as requested by plaintiffs in error as set forth in Plaintiffs' Exception No. 29.

42. Said Court erred in refusing to reverse the judgment of the said District Court for its error in refusing to make a finding of fact as requested by plaintiffs in error as set forth in Plaintiffs' Exception No. 30.

43. Said Court erred in refusing to reverse the judgment of the said District Court for its error in refusing to make a finding of fact as requested by plaintiffs in error as set forth in Plaintiffs' Exception No. 31.

44. Said Court erred in refusing to reverse the judgment of the said District Court for its error in refusing to make a finding of fact as requested by

plaintiffs in error as set forth in Plaintiffs' Exception No. 32.

45. Said Court erred in refusing to reverse the judgment of the said District Court for its error in refusing to make a finding of fact as requested by plaintiffs in error as set forth in Plaintiffs' Exception No. 33.

46. Said Court erred in refusing to reverse the judgment of the said District Court for its error in refusing to make a finding of fact as requested by plaintiffs in error as set forth in Plaintiffs' Exception No. 34.

47. Said Court erred in refusing to reverse the judgment of the said District Court for its error in refusing to make a finding of fact as requested by plaintiffs in error as set forth in Plaintiffs' Exception No. 35.

48. Said Court erred in refusing to reverse the judgment of the said District Court for its error in overruling plaintiffs in error's objection to the said District Court's making the finding referred to in Plaintiffs' Exception No. 36.

49. Said Court erred in refusing to reverse the judgment of the said District Court for its error in overruling plaintiffs in error's objection to the said District Court's making the finding referred to in Plaintiffs' Exception No. 37.

50. Said Court erred in refusing to reverse the judgment of the said District Court for its error in overruling plaintiffs in error's objection to the said District Court's making the finding referred to in Plaintiffs' Exception No. 38.

WHEREFORE, plaintiffs in error pray that the judgment of said United States Circuit Court of Appeals for the Ninth Circuit be reversed and that the said cause be remanded to said District Court of the United States for the Northern District of California, Second Division, with instructions to enter judgment in favor of plaintiffs in error upon the second count in their complaint contained for the full amount prayed for.

Dated: San Francisco, California, October 19th, 1916.

IRA A. CAMPBELL,
Attorney for Plaintiffs in Error.

[Endorsed]: Assignment of Errors. Filed Oct. 19, 1916. F. D. Monckton, Clerk.

Service of the within Assignment of Errors and receipt of a copy is hereby admitted this 19th day of October, 1916.

JNO. W. PRESTON,
U. S. Attorney.

*United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 2683.

J. HOMER FRITCH, INCORPORATED, a Corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Order Allowing Writ of Error.

Upon the filing of the petition of the above-named J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, plaintiffs in error herein, for a writ of error from the Supreme Court of the United States to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors, IT IS ORDERED that a writ of error as prayed for in said petition be, and the same is hereby, allowed to the said J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers to have reviewed by the Supreme Court of the United States the judgment heretofore entered in the above-entitled cause

and the proceedings in the trial of said cause prior thereto, and that the amount of the bond to be filed in this court by said J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers in connection with the writ of error prayed for be, and the same is hereby, fixed in the sum of two hundred and fifty (250) dollars.

AND IT IS FURTHER ORDERED that upon the filing of an approved bond in said amount all further proceedings in said United States Circuit Court of Appeals for the Ninth Circuit and in said District Court of the United States for the Northern District of California, Second Division, shall be suspended and stayed until the determination of such writ of error by the Supreme Court of the United States.

Dated this 19th day of October, 1916.

WM. B. GILBERT,

Circuit Judge of the Ninth Judicial Circuit.

[Endorsed]: Order Allowing Writ of Error.
Filed Oct. 19, 1916. F. D. Monckton, Clerk.

Service of the within Order Allowing Writ of Error and receipt of a copy is hereby admitted this 19th day of October, 1916.

JNO. W. PRESTON,

U. S. Attorney.

*United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 2683.

J. HOMER FRITCH, INCORPORATED, a Corporation, E. T. KRUSE, MARY BELL PARKER BURNS, CECELIA SUDDEN, JAMES HOGG, JAMES P. TAYLOR and KATE E. SPIERS,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Cost Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, Massachusetts Bonding and Insurance Company a corporation, created, organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, and duly authorized to transact business in the State of California, and fully qualified before the department of justice to execute bonds and undertakings in any and all federal courts of the United States of America, is held and firmly bound unto the defendant in error herein, United States of America, in the full and just sum of two hundred and fifty (250) dollars, to be paid to said defendant in error, to which payment well and truly to be made the undersigned binds itself and its successors by these presents.

SEALED with our seals and dated this 19th day of October, 1916.

WHEREAS, in the above-entitled cause a petition is about to be filed for the allowance of a writ of error to have the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, rendered in the above-entitled cause on or about the 10th day of July, 1916, and the proceedings in said cause prior thereto reviewed by the Supreme Court of the United States;

NOW, THEREFORE, if such writ of error shall issue according to the prayer of the petition in that behalf, and if said J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers, the said plaintiffs in error, shall prosecute said writ of error to effect, and answer all damages and costs, if they shall fail to make their plea good, then the above obligation to be null and void; otherwise the same shall be and remain in full force and virtue.

MASSACHUSETTS BONDING AND INSURANCE COMPANY.

[Seal]

By JOHN H. ROBERTSON,
Its Attorney-in-fact.

By FRANK M. HALL,
Its Attorney-in-fact.

The foregoing bond is hereby approved this 19th day of October, 1916.

WM. B. GILBERT,
Circuit Judge of the Ninth Judicial Circuit.

[Endorsed]: Cost Bond on Writ of Error. Filed
Oct. 19, 1916. F. D. Monckton, Clerk.

Service of the within Cost Bond on Writ of Error
and receipt of a copy is hereby admitted this 19th
day of October, 1916.

JNO. W. PRESTON,
U. S. Attorney.

*United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 2683.

J. HOMER FRITCH, INCORPORATED, a Cor-
poration, E. T. KRUSE, MARY BELL
PARKER BURNS, CECELIA SUDDEN,
JAMES HOGG, JAMES P. TAYLOR and
KATE E. SPIERS,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

**Praeipie for Certified Transcript of Record on
Return to Writ of Error from United States
Supreme Court.**

To the Clerk of the Above-entitled Court:

Sir: Please make and furnish me with a certified
printed transcript of the record (including the pro-
ceedings had in said Circuit Court of Appeals) and
not less than thirty (30) uncertified copies thereof,
for use on writ of error from the Supreme Court of
the United States in the above-entitled cause, the

said transcript to consist of copies of the following:

1. Printed transcript of record on which the cause was heard in said Circuit Court of Appeals, to which will be added a printed copy of the following entitled proceedings that were had and of the papers that were filed in said Circuit Court of Appeals, viz.:

2. Order of submission entered March 23, 1916;
3. Order directing filing of opinion, etc., entered July 10, 1916;

4. Opinion filed July 10, 1916;

5. Judgment filed and entered July 10, 1916;

6. ~~Petition of plaintiffs in error for a rehearing, filed July 28, 1916;~~

7. Order directing filing of opinion on denial of petition for rehearing, entered October 16, 1916;

8. Order denying petition for rehearing, entered October 16, 1916;

9. Opinion on denial of petition for rehearing, filed October 16, 1916;

10. Order staying issuance of mandate filed October 18, 1916;

11. The following papers on writ of error from the Supreme Court of the United States:

Petition for writ of error and order fixing amount of the cost bond;

Assignment of errors;

Order allowing writ of error and fixing amount of cost bond;

Cost bond on writ of error;

12. Praecipe for transcript of record, filed October 1916;

13. Certificate of Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to said transcript;

14. Original writ of error;

15. Original citation on writ of error.

Please prepare thirty (30) or more uncertified printed copies of said record by printing thirty (30) or more copies of the above-entitled proceedings that were had and papers that were filed in said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and by binding one of the latter printed copies of said proceedings, etc., at the end of each of thirty or more extra copies of the printed transcript of record on which said cause was heard in said United States Circuit Court of Appeals for the Ninth Circuit.

Dated San Francisco, California, October 19th, 1916.

IRA A. CAMPBELL,
Attorney for Plaintiffs in Error.

[Endorsed]: Praeceptum for Transcript of Record on Return to Writ of Error from Supreme Court U. S. Filed Oct. 19, 1916. F. D. Monekton, Clerk.

Service of the within praecipe and receipt of a copy is hereby admitted this 19th day of October, 1916.

JNO. W. PRESTON,
U. S. Attorney.

*United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 2683.

J. HOMER FRITCH, INCORPORATED, et al.,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

**Certificate of Clerk U. S. Circuit Court of Appeals
to Transcript of Record Upon Return to Writ
of Error from the Supreme Court of the United
States.**

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and ninety-seven (197) pages, numbered from and including 1 to and including 197, to be a true copy of the record, and of the assignment of errors, and of all proceedings in the above-entitled case, made up pursuant to the praecipe filed by counsel for the plaintiffs in error on the 19th day of October, A. D. 1916, under Rule 8 of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office, and that the same constitute the Transcript of Record and return to the writ of error from the Supreme Court of the United States in the above-entitled cause, as made up and certified pursuant to said praecipe.

ATTEST my hand and the seal of the said United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this twenty-fourth day of October, A. D. 1916.

[Seal]

F. D. MONCKTON,
Clerk.

'Writ of Error.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2683.

J. HOMER FRITCH, INCORPORATED, a Corporation; E. T. KRUSE,
Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P.
Taylor, and Kate E. Spiers, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the
Judges of the United States Circuit Court of Appeals for the Ninth
Circuit, Greeting:

Because in the record and proceedings, as also in the rendition
of the judgment of the plea which is in the said United States Cir-
cuit Court of Appeals, for the Ninth Circuit, before you, or some of
you, between J. Homer Fritch, Incorporated, a corporation, E. T.
Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James
P. Taylor and Kate E. Spiers, plaintiffs in error, and The United
States of America, defendant in error, a manifest error hath hap-
pened to the great damage of the said J. Homer Fritch, Incorporated,
a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden,
James Hogg, James P. Taylor and Kate E. Spiers, plaintiffs in error,
as by their complaint appears.

We, being willing that error, if any hath been, should be duly
corrected, and full and speedy justice done to the parties aforesaid in
this behalf, do command you, if judgment therein be given, that
then, under your seal, distinctly and openly, you send the record and
proceedings aforesaid, with all things concerning the same, to the
Supreme Court of the United States, together with this writ, so that
you have the same at Washington, within sixty (60) days from the
date hereof; that the record and proceedings aforesaid being in-
spected, the said Supreme Court of the United States may cause fur-
ther to be done therein to correct that error, what of right, and accord-
ing to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of
the United States, this 19th day of October, in the year of our Lord
one thousand nine hundred and sixteen.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,

*Clerk of the United States Circuit Court of
Appeals for the Ninth Judicial Circuit.*

Allowed by:

WM. B. GILBERT,

*United States Circuit Judge for the
Ninth Judicial Circuit.*

[Endorsed:] Docketed. No. 2683. United States Circuit Court of Appeals for the Ninth Circuit. J. Homer Fritch, Incorporated, a corporation, et al., Plaintiffs in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed Oct. 19, 1916. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. Ira A. Campbell, Attorney for Plaintiffs in Error, 1107 Merchants Exchange Building, San Francisco, California.

Service of the within Writ of Error and receipt of a copy is hereby admitted this 19th day of October, 1916.

JNO. W. PRESTON,
U. S. Attorney.

Return to Writ of Error.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a certain schedules to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

Dated at San Francisco, Cal., this 24th day of October, A. D. 1916.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIR-
CUIT,

By F. D. MONCKTON, *Clerk.*

Citation on Writ of Error.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2683.

J. HOMER FRITCH, INCORPORATED, a Corporation; E. T. KRUSE,
Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P.
Taylor, and Kate E. Spiers, Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA, Defendant in Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to The United States of America and to Thomas Watt Gregory, Attorney General of said United States of America, and to John W. Preston, United States Attorney for the Northern District of California, and to M. A. Thomas, Esq., Assistant United States Attorney for the Northern District of California:

You and each of you are hereby notified that in a certain cause in the United States Circuit Court of Appeals for the Ninth Circuit, wherein J. Homer Fritch, Incorporated, a corporation, E. T. Kruse, Mary Bell Parker Burns, Cecelia Sudden, James Hogg, James P. Taylor and Kate E. Spiers are plaintiffs in error and The United States of America is defendant in error, the said plaintiffs in error have prayed a writ of error to the Supreme Court of the United States from the judgment of the United States Circuit Court of Appeals for the Ninth Circuit in said cause entered on or about the 10th day of July, 1916, and that said plea has been allowed;

Wherefore, you are hereby cited and admonished to appear in the Supreme Court of the United States to be holden in Washington, District of Columbia, within sixty (60) days from the date hereof, to show cause why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. William B. Gilbert, Senior United States Circuit Judge for the Ninth Judicial Circuit, this 19th day of October, 1916.

WM. B. GILBERT,

United States Circuit Judge for the Ninth Judicial Circuit.

[Endorsed:] Docketed. No. 2683. United States Circuit Court of Appeals for the Ninth Circuit. J. Homer Fritch, Incorporated, a corporation, et al., Plaintiffs in Error, vs. The United States of America, Defendant in Error. Citation on Writ of Error. Filed Oct. 19, 1916. F. D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. Ira A. Campbell, Attorney for Plaintiffs in Error, 1107 Merchants Exchange Building, San Francisco, California.

Service of the within Citation on Writ of Error and receipt of a copy is hereby admitted this 19th day of October, 1916.

JNO. W. PRESTON,
U. S. Attorney.

Endorsed on cover: File No. 25,595. U. S. Circuit Court Appeals, 9th Circuit. Term No. 765. J. Homer Fritch, Incorporated; E. T. Kruse, Mary Bell Parker Burns, et al., plaintiffs in error, vs. The United States. Filed November 4th, 1916. File No. 25,595.

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In the Supreme Court

OF THE
United States

October Term, 1916

No. 765

J. HOMER FRITCH, INCORPORATED, E. T. KRUSE,
MARY BELL PARKER BURNS et al.,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

I.

Statement of the Case.

Plaintiffs in error brought suit against the United States in the United States District Court for the Northern District of California under the so-called Tucker Act (24 Stats. at Large 505; Act of March 3, 1887).

The complaint contained two counts. The first count was for \$1462.75 for charter hire of the Steamer

"Homer" from September 1 to 12, 1911, at the agreed rate of \$142.50 per day, pursuant to a charter dated April 12, 1911. The second count was for \$4488.75 for charter hire under an extension of the same charter for thirty days from and after September 12, 1911.

The District Court gave judgment in favor of plaintiffs in error (plaintiffs) on the first count. It gave judgment for the United States on the second count. Plaintiffs in error sued out a writ of error to the Circuit Court of Appeals for the Ninth Circuit, attacking by said writ so much of the judgment of the District Court as denied to them recovery of their second count. The Circuit Court of Appeals affirmed the judgment, although upon grounds altogether different from those given by the District Court. Plaintiffs in error thereupon sued out the present writ of error.

THE FACTS.

The "Homer" had been chartered by the Government during the summer months for several years prior to 1911.

For several years prior to 1911, the Department of Commerce and Labor, through its agencies on the Pacific Coast, had chartered from plaintiffs in error their steamer, the "Homer". The Bureau of Fisheries of that Department had used the "Homer" in connection with the Alaska Seal Fisheries, sending her from San Francisco on trips to the Fisheries Station on the Pribilof Islands, and had so used her during from three to four months in the summer of each year (tr. p. 54).

When the time came to arrange for the charter for 1911, the Department negotiated for the purchase of the "Homer".

The "Homer" was well suited to the needs of the Department, and (as she was costing the Department between \$15,000 and \$20,000 a year in charter hire) ultimately those who had the affairs of the Department in hand recognized the economy and advantage of purchasing her (tr. p. 56). Among these were George M. Bowers, the Commissioner of Fisheries, and W. I. Lembkey, the Agent of the Department of Commerce and Labor for the Alaska Seal Fisheries (tr. p. 54).*

Accordingly, in the fall of 1910, when the matter of arranging for the services of the "Homer" for the summer months of 1911 was taken up, extensive correspondence passed between the parties in which the subject of the purchase of the "Homer" by the Department was discussed (tr. pp. 56-78).

These negotiations failed, for want of a sufficient appropriation, but led to the insertion of the option clause (Clause 21) in the charter for 1911.

These negotiations failed because the Department, while it had on hand a fund of \$20,000, which was available for the purchase outright of the "Homer", and other funds which could be used for its charter, was not in a position to pay the full price asked by the owners (tr. p. 72). The negotiations led, however, to

* Lembkey's position was a statutory one.

"The Secretary of the Treasury (now Commerce and Labor) is authorized to appoint one agent and three assistant agents, who shall be charged with the management of the seal fisheries in Alaska, and the performance of such other duties as may be assigned to them by the Secretary of the Treasury." (1 Fed. Stats. Ann. 429, Sec. 1973.)

the insertion in the charter party for 1911, of a clause permitting the Department "at any time during the charter" to purchase the "Homer" for \$45,000, and to apply upon account of the purchase price the amount paid as charter hire during the summer of 1911 (tr. pp. 75-78).

In the course of the correspondence plaintiffs in error were told that the Department might desire to extend the charter so that the amount due as charter money might mount up to within reach of the \$20,000 appropriation which was available.

On December 2, 1910, in the course of the correspondence referred to, Lembkey wrote to J. Homer Fritch, who represented the plaintiffs in error in all of these transactions:

"Department of Commerce and Labor.
Bureau of Fisheries.
Washington.

Personal.

December 2, 1910.

My dear Mr. Fritch:

"Your letter of November 23, regarding the purchase of the 'Homer' is to hand. The Commissioner wished me to write you a personal letter about the matter.

"The Commissioner desires to purchase the 'Homer'. The terms of purchase, however, require some adjustment. The situation is about as follows, and, as a business man, you will readily grasp it:

"The appropriation, of which we have an unexpended balance this year and from which the purchase of the vessel was contemplated, has been decided to be not available for purchase of a vessel, although it can be used for chartering. We have, however, another appropriation of \$20,000, which can be used for purchase outright of a vessel for

Alaska. The object, therefore, if a vessel should be purchased, is to pay the \$20,000 down as part payment of the purchase money, and to have the balance of the latter paid as charter money from the other appropriation.

"If we were to charter the 'Homer' this spring, therefore, it would be on the understanding that the charter money so paid should apply on the purchase price. *Then we could prolong the charter, perhaps, by laying her up in the creek or by some other arrangement, until the charter money would reach an amount equal to the balance of the purchase price.*

.
Very truly yours,
(Signed) W. I. LEMBKEY."

(Tr. p. 64.)

Again, on December 15, 1910, Lembkey wrote:

"Department of Commerce and Labor.
Bureau of Fisheries.

Personal. December 15, 1910, Washington.
My dear Mr. Fritch:

"I beg to acknowledge the receipt yesterday of your letter of the 8th instant, in which you state that the idea conveyed in my personal letter of the 2d instant, regarding the purchase of the 'Homer', is favorably received.

"I must state frankly that, at first, I partially misunderstood the Commissioner's idea regarding the arrangements for purchase. It is his desire to make a charter in the usual way as though the question of sale were not under discussion; *to allow the charter-money to accrue to an amount equal to the purchase price, less \$20,000*; and then, being in a position to state that he virtually could buy the ship for \$20,000, he would proceed to do so. This is the same proposition as contained in my former letter, except that the payment of the \$20,000 occurs at the latter end of the transaction

instead of at the beginning. I hope this will make no difference in your calculations.

Very truly yours,

(Signed) W. I. LEMBKEY."

(Tr. p. 67.)

The charter for 1911 was made April 24, 1911, and contained the very option clause which had been discussed in the correspondence.

The charter for 1911 was entered into on April 24, 1911 (tr. p. 17), and was "for a period of about 3½ months" (tr. p. 18). It contained the option clause as already outlined (tr. p. 23). This clause read as follows:

"21. That the charterers have the option, at any time during this Charter, of purchasing the said vessel for the sum of Forty-five Thousand (\$45,000.00) Dollars against which any amount paid for the hire of the said vessel less cost of operation shall be set off and deducted, but that the purchasers shall pay interest at the rate of 6% per annum (and insurance) on the amount of purchase money from the date of this charter to the completion of sale."

(Tr. p. 23.)

On September 12, 1911, after the "Homer" had returned to San Francisco from the second trip to the Pribilof Islands, the Department sent to plaintiffs in error the telegram which they took to be an offer for the extension of the charter and which they immediately accepted as such.

The Department took the vessel on May 15, 1911 (tr. p. 25). It had returned from its second voyage to the Pribilof Islands and was ready to be turned over to its owners at noon on September 12, 1911 (tr. pp. 25, 28,

83). But on the morning of September 12, 1911 (at 10:07 a. m., Washington time), the Department sent plaintiffs in error a telegram (tr. pp. 26, 39, 43, 83).

The dispute in this case is as to whether this telegram contemplated that the charter should be extended with the option, or whether the option should be extended but that the charter should terminate. Plaintiffs in error contend that it was an offer to extend the charter, (1) on its face; (2) in view of all of the circumstances under which it was sent, in view of what had gone before, and in view of the subsequent actions of the Department under it. The Government claims that it was an offer to extend the option only.

The telegram was as follows:

"Washington, D. C., Sept. 12, 1911. 10:07 A. M.
J. Homer Fritch, Inc.,
San Francisco, Cal.

Would like to have option for purchase of Homer extended thirty days on terms mentioned in paragraph twenty-one of charter otherwise charter to terminate as provided therein answer.

CHARLES EARL, Acting Secretary."

(Tr. p. 26.)

The "Homer" was immediately "laid up" in Oakland Creek, in precise accord with the suggestion contained in the 1910 correspondence, and remained there for more than thirty days. Lembkey was present and knew of this.

After the receipt of this telegram what occurred was precisely in accord with Lembkey's letter of December 2, 1910. The "Homer" was laid up in Oakland Creek, and there remained for more than thirty days (tr. p. 88). Lembkey himself went aboard and knew that the vessel was being held in the Creek. There was no

attempt to deny the testimony in this regard, which was:

“Q. After the receipt of that telegram from the Government and after that endorsement had been put upon the charter which you have spoken of, what did you do with the steamer ‘Homer’?

A. Put her over in Oakland Creek and let her lay there, laid her up.

Q. Did Mr. Lembkey know that it was over there? A. Yes.

Q. Did you tell Mr. Lembkey that it was over there? A. Yes.

Q. Did Mr. Lembkey go aboard?

A. I think he did, yes.

Q. How long after that was it that Mr. Lembkey went away, do you remember? A. No.

Q. How long did the ‘Homer’ remain over there at the Oakland Creek?

A. Well, she remained the whole of that month anyhow, and how much longer I could not say now.”

(Testimony of J. Homer Fritch, Tr. p. 88.)

The telegram of September 14, 1911. Department advised that plaintiffs in error construed telegram of September 12th as extending “charter” and did not object to that construction.

On September 14, 1911, the Department was advised that *the charter* had been extended. It received from plaintiffs the following telegram:

“San Francisco, Sept. 14, 1911.

“Acting Secretary,
Dept. of Commerce & Labor,
Washington, D. C.

“As requested in your telegram of twelfth instant charter steamer ‘Homer’ hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase.

J. HOMER FRITCH, INC.”

(Tr. pp. 27, 84, 86.)

The Department made no reply to this telegram.

The telegram of October 10, 1911. Department again advised charter had been extended. Department answered this telegram but did not object to construction of telegram of September 12th contained therein.

On October 10, 1911, the Department received the following telegram from plaintiffs:

"San Francisco, Oct. 10, 1911.

George M. Bowers,
Commissioner of Fisheries,
Dep't of Commerce & Labor,
Washington, D. C.

"Your extension of charter and option of Steamer 'Homer' expires October 13th. Should this expire without further action on the part of the department ship will go to holder of second option upon which one thousand dollars has been paid. Should you indicate that you wish to exercise your option terms of payment can be satisfactorily arranged without doubt. Kindly wire your wishes in the premises.

J. HOMER FRITCH."

(Tr. p. 28.)

The Department's reply to this telegram was as follows:

"Washington, D. C., Oct. 12-11.

J. Homer Fritch, Inc.,
Fife Bldg., Sanfran.

Replying yours Oct. ten Bureau of Fisheries is not in position to purchase Homer.

I. H. DUNLAP,
Actg. Commr."

(Tr. p. 29.)

The Department did not give any indication whatever that the charter had not been extended until October 25, 1911, two weeks after the expiration of the extension.

The first intimation of the Department's position came to plaintiffs two weeks after the expiration of the

term of the extension. About November 1, 1911, plaintiffs received the following letter, dated October 25, 1911:

"Washington, October 25, 1911.

Mr. J. Homer Fritch,
110 East Street,
San Francisco, Cal.

Sir:

Replying to your letter of the 14th instant, inclosing duplicate bills for charter of the steamship 'Homer' from September 1 to October 13, 1911, inclusive, you are informed that the vessel was discharged and relinquished to her owners on September 12 noon and that the Department has not extended or renewed the charter nor approved the action of any officer of the Department attempting to bind it for charter money beyond that time.

Respectfully,
(Sgd) BEN J. CABLE,
Acting Secretary."

(Tr. p. 30.)

Finally, as showing conclusively that plaintiffs in error were not alone in their interpretation of the telegram of September 12, 1911, it appears that Lembkey himself on September 13th, endorsed upon the charter that it had been extended "According to the telegram of Sept. 12th".

On September 13, 1911, Lembkey, being at the time in San Francisco and having been shown the Department's telegram of September 12th, endorsed the following upon the owners' duplicate of the charter:

"According to telegram of September 12th received from Mr. Chas. Earl, Acting Secretary, Department of Commerce & Labor, this Charter is hereby extended for a period of 30 days from September 13th, 1911.

"Subject to approval of Dept. of Commerce & Labor.

W. I. LEMBKEY,
Agent Seal Fisheries."

(Tr. pp. 26-27; 46; 85-86.)

CONTENTIONS OF PLAINTIFFS IN ERROR.

First—The telegram literally an offer to extend the charter, and not even ambiguous in that regard.

The first contention of plaintiffs in error is that the wording of the telegram of September 12, 1911, from the Department of Commerce and Labor literally construed constituted it an express offer to extend *the charter* thirty days, and that the express acceptance of it as such by plaintiffs in error, by their telegram of September 14, 1911, to the Department, made a complete written contract for a thirty day extension of the charter. They contend, first, that its language was such that literally it could have *but one* meaning. They contend that literally construed it could only be construed as an offer to *extend the charter and the option together*. They contend that literally construed it could not be construed as an offer to extend the option alone. The very definite and pointed grounds for this contention (which neither the District Court nor the Circuit Court of Appeals noticed or answered) are presented herein in their proper place.

Second—If ambiguous, the telegram nevertheless shown to have been intended as an offer to extend the charter.

Plaintiffs in error take a second ground. Assuming that the court rejects their first ground, namely, that the telegram of September 12th could have but one meaning, *then at most the telegram was ambiguous*. At most it could have meant either an extension of the charter and the option for thirty days or of the option alone for thirty days.

Plaintiffs in error contend that if there was this ambiguity, then, by all the canons of construction, by all the accepted rules applicable to such a situation, the telegram of September 12th must be construed as an offer for the extension of *the charter with the option*—not of the option alone. This contention rests upon the application to the case at bar of three separate principles.

(1) Rule that party drawing ambiguous contract will be held to interpretation least favorable to him applies here.

The authorized officers of the Department of Commerce and Labor at Washington drafted and sent to plaintiffs in error the telegram of September 12, 1911. The Department, therefore, created the ambiguity—if ambiguity there was in the telegram. An unbroken and undisputed line of federal authority holds that the rule that where one party to a contract creates an ambiguity therein, that is to say, where one party is responsible for the ambiguous language used in the contract, the construction least favorable to such party shall be adopted, applies to contracts between individuals and the United States government, and in such a case may be invoked against a department of the United States government.

(2) Rule that when contract ambiguous and one party does not object to interpretation placed on it by other, that interpretation will be adopted, applies here.

Again, assuming that there was ambiguity in the telegram of September 12, 1911, nevertheless the Depart-

ment was expressly notified on September 14th by plaintiffs in error that the "*charter*" was extended thirty days. Notwithstanding this, the Department remained silent—did not repudiate this construction of its telegram of September 12, 1911, until October 25, 1911, long after the thirty day period had expired. Even when, on October 12th, having been advised by plaintiffs in error by the telegram of October 10th that "Your extension of *charter* and option steamer 'Homer' expires October 13th", it wired plaintiffs in error "Replying yours Oct. ten Bureau of Fisheries is not in position to purchase Homer," it said nothing in repudiation of the *extension of the charter*. Assuming, therefore, that there was an ambiguity in the meaning of the telegram of September 12th, nevertheless the Department not only created that ambiguity, *but had immediate notice of the construction placed upon the telegram by plaintiffs in error*—a construction not only permissible from the language used but one most reasonable in view of the pre-announced intention of the Department (in the letters of December 2 and 15, 1910) to "prolong the charter by laying her up in the creek or by some other arrangement, until the charter money would reach an amount equal to the amount of the purchase price" (tr. p. 64).^{*} Plaintiffs in error therefore invoke the well-recognized rule of construction that

^{*} At the time when the telegram of September 12, 1911, was received by plaintiffs in error, the "Homer" had earned practically 120 days' hire (May 15 to September 12, 1911), at \$142.50 per day, or approximately \$17,100. As plaintiffs in error had been advised, the Department had available for the purchase of the "Homer" \$20,000, and the purchase price was \$45,000. Therefore, plaintiffs in error knew that by the thirty day extension of the charter, involving as it did an additional payment of about \$4500 charter hire, the Department would practically have met the payment of the full purchase price of \$45,000 *precisely in the manner outlined in the December correspondence.*

when the language of a contract is ambiguous and one party has notice of the other party's belief in a certain construction of it, and does not object, the court will adopt such construction. This rule has been repeatedly and unsparingly applied by the federal courts against the government, and both logic and justice require that it should control the determination of the present case.

(3) If ambiguous, nevertheless the evidence was uncontradicted that the telegram was intended as an offer to extend the charter.

Again, assuming for the sake of argument that the telegram of September 12, 1911, was ambiguous, both of the courts below should have interpreted the telegram in the light of the surrounding facts and should have given it that meaning compelled by such facts. Most of the facts were embodied in an agreed statement, and the evidence offered by plaintiffs in error was uncontradicted. The facts leading up to the sending of the telegram, the attendant circumstances and those showing the contemporaneous and subsequent understanding of the parties all pointed irresistibly to the conclusion that it was intended as an offer to extend the charter as well as the option, for thirty days. There was not a single fact or a single word of testimony tending to establish the contrary. The government did not call a witness—did not even call upon Lembkey to explain why he made the endorsement on the charter above referred to. The evidence was all one way and compelled the conclusion that the telegram of the 12th was correctly interpreted by plaintiffs in error as an offer to extend the charter.

THE CONFLICTING CONCLUSIONS OF THE DISTRICT COURT
AND OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT.

The District Court in effect held that no matter what the evidence showed, the telegram could not be read as an offer to extend the charter. The Appellate Court repudiated this view.

The learned district judge in effect held that the telegram of September 12, 1911, was susceptible of but one interpretation—namely, that it was an offer to extend the option alone. The Circuit Court of Appeals repudiated this view, saying:

“If that was the message intended to be conveyed, the word ‘otherwise’ was unfortunately chosen. That meaning, it seems to us, is not suggested by the other words of the telegram, and is not the natural meaning.”

The Circuit Court of Appeals correctly held that the Department was in duty bound to express its dissent from the construction placed upon the telegram of September 12th by plaintiffs in error in their telegram to the Department of September 14th, but erroneously held that the rule invoked was one of equitable estoppel, and that the case of plaintiffs in error failed because they did not show that they had “changed their position” in reliance upon the failure of the Department to express such dissent.

The Circuit Court of Appeals was deeply impressed with the fact that the Department of Commerce and Labor was immediately notified by the telegram sent by plaintiffs in error on September 14, 1911, that “*the charter*” was extended—that plaintiffs in error had adopted that construction of the Department’s offer of the 12th. The court said:

“That telegram (the telegram of September 14th) distinctly advised the Acting Secretary that his proposition of September 12th was understood to be a proposition to extend both the charter and the option to purchase. If he did not assent to that interpretation of his proposal, it was his duty then to disclaim it.”

But the Circuit Court of Appeals held that the rule invoked on this branch of the case was one of equitable estoppel, and that plaintiffs' case failed because they did not show that “they had been induced to change their position” by the Department's failure to repudiate their construction of the telegram.

The Circuit Court of Appeals erred in holding the rule to be one of estoppel. The rule one of the construction of contracts.

It is submitted that the error of the Circuit Court of Appeals in so holding is clear-cut and vital. The rule invoked is not grounded in estoppel. *It is a rule of the construction of a contract.*

This is thoroughly established both by reason and authority. That this court and the lower federal courts have repeatedly applied it against the United States definitely establishes the fact that the rule does not rest in estoppel, *because estoppel can never be invoked against the sovereign*. It has, moreover, been expressly pointed out that the rule does not rest in estoppel but is one of the construction of a contract.*

*See opinion of Judge Thayer, concurred in by Mr. Justice Brewer, in *Central Trust Co. v. Wabash St. L. & P. Ry. Co.*, 34 Fed. 254, 258, quoted *infra*.

The rule is a branch of the general rule that, where a contract is ambiguous, the intention of the parties is to be ascertained by reference to the practical construction which they place upon it, as evidenced by their contemporaneous and subsequent actions under it. Where parties use language capable of two constructions, the courts must have some guide by which to ascertain the intention of the parties. Thus, when the language of a contract is capable of two meanings, and one party notifies the other that he places one of the two possible constructions upon it, and the latter does not express his dissent from such construction, the rule has become established that the courts will follow such construction.

Plaintiffs in error in the District Court offered to prove that they had "changed their position" relying upon the Department's failure to dissent from their construction of the telegram of September 12th, and the District Court ruled against the offers as immaterial. The judgment should have been reversed, therefore, even upon the theory which the Circuit Court of Appeals adopted.

The sole reason assigned by the Circuit Court of Appeals for affirming the judgment was that there was no evidence in the record that plaintiffs in error "changed their position" in reliance upon the failure of the Department to dissent from the construction placed by plaintiffs in error upon the telegram of September 12th in their telegram to the Department of September 14th. In a variety of ways, which will be noticed hereafter in their proper places, plaintiffs in error made repeated offers in the trial court to prove that they did so change their position in reliance upon

the apparent assent to the Department to the extension of the charter. All of these offers were rejected by the District Court *upon the ground that they were immaterial*. For this reason the Circuit Court of Appeals should have reversed the judgment and ordered a new trial, even if it be conceded that the rule laid down and applied by that court was correctly interpreted.

Error of the Circuit Court of Appeals in failing to apply rule that where a party draws an instrument containing ambiguous language, the meaning least favorable to such party must be adopted.

The Circuit Court of Appeals altogether ignored the fact that the telegram of September 12th was written by the Department. It failed to apply or to attach any weight whatever to the rule that when a contract is ambiguous—capable of being read in either of two ways—that interpretation least favorable to the drawer of the instrument will be accepted.

Error of the Circuit Court of Appeals in failing to interpret the telegram (assuming it to be ambiguous) in the light of the intentions of the parties as disclosed by the undisputed evidence.

The Circuit Court of Appeals failed to apply the rule that when the language of a contract is ambiguous, the intention of the parties must be ascertained from the surrounding circumstances and the prior, contemporaneous and subsequent acts of the parties. Holding as it did that the language was ambiguous, the Circuit Court of Appeals unquestionably should have reversed

the District Court for its rulings upon evidence and findings, which were admittedly based on the theory that the contract was unambiguous and that the evidence of the intention of the parties and of the collateral facts was inadmissible. Such facts as were admitted and such evidence as was allowed show the intended meaning of the telegram of September 12th conclusively, however, and had the Circuit Court of Appeals applied the rule referred to, it was bound to interpret the telegram as an offer to extend the charter and not the option alone.

II.

Specification of Errors.

The telegram was unambiguous on its face. Literally and because of its express language, it was capable of but one meaning, an offer to extend the charter. Both courts below erred in refusing to so hold (assignments 8, 11 and 12).

If the telegram was ambiguous the Circuit Court of Appeals erred in refusing to apply the rule that where an instrument contains language capable of two meanings, the courts will adopt the construction least favorable to the drawer of the instrument (assignment 7).

If the telegram was ambiguous the Court of Appeals erred in refusing to apply the rule that where a contract contains ambiguous language, and one party is given notice that the other has adopted one of the two possible meanings and does not protest, the courts will adopt

such meaning (assignment 5). Incidentally, the Circuit Court of Appeals erred in holding this to be a rule of equitable estoppel—instead of a rule of the construction of contracts (assignment 4).

If the telegram was ambiguous the court below erred in refusing to hold that in view of all the evidence the telegram of September 12th was an offer to extend the charter (assignments 9 and 10). Errors in the rejection of evidence tending to show this (assignments 15, 16, 19, 20; 21, 22, 23, 24, 25, 26 and 30). Errors in refusing to find undisputed facts tending to establish this (assignments 32 to 50, inclusive).

Error of the Circuit Court of Appeals in refusing to reverse upon the ground that there was no evidence of "change of position" on the part of plaintiffs in error, the record showing that the offers to prove this made by plaintiffs in error were ruled out by the District Court as immaterial (assignments 6, 17, 18, 27, 28 and 29).

III.

Brief of the Argument.

(1)

LITERALLY CONSTRUED, THE TELEGRAM OF SEPTEMBER 12, 1911, WAS AN OFFER TO EXTEND THE CHARTER. IT WAS NOT AMBIGUOUS. IT COULD NOT BE CONSTRUED AS AN OFFER TO EXTEND THE OPTION ALONE.

Plaintiffs in error rely upon two features of the telegram of September 12, 1911, as establishing this:

First—the clause “on terms mentioned in paragraph twenty-one of charter;”

Secondly—the word “otherwise”.

- (a) “On terms mentioned in paragraph twenty-one of charter.” One of those terms prescribed the continued existence of charter.

The telegram of September 12, 1911, read:

“10.07 A. M.

Washington, D. C. Sept. 12-1911.

J. Homer Fritch, Inc.,
San Francisco, Cal.

Would like to have option for purchase of Homer extended thirty days *on terms mentioned in paragraph twenty one of charter* otherwise charter to terminate as provided therein answer.

CHARLES EARL,

Acting Secretary.”

(Tr. p. 26.)

The option referred to contained in paragraph 21 of the charter read:

“21. That the Charterers have the option, *at any time during this Charter*, of purchasing the said vessel for the sum of Forty-five Thousand (45,000.00) Dollars against which any amount paid for the hire of the said vessel less cost of operation shall be set off and deducted, but that the purchasers shall pay interest at the rate of 6% per annum (and insurance) on the amount of purchase money from the date of this Charter to the completion of sale.”

(Tr. p. 23.)

Paragraph 21 of the charter is expressly referred to in the telegram. It, therefore, became a part of the offer which the Department placed before plaintiffs.

The telegram particularly asked an extension of the option "on terms mentioned in paragraph 21 of charter". One of the terms of paragraph 21 of the charter (and a most important one) was that the charterers might purchase "at any time during this charter". This was one of the terms, therefore, on which the extension of the option was asked.

The charter provided that the charterers should be entitled to set off and deduct any amount paid as charter hire against the agreed price. This right was of substantial benefit to the Government, but it could hardly be expected to outlive the charter. In other words, the charterers could not fairly expect to stop paying hire and still exercise such a privilege. That it was not in the original contemplation of the parties is apparent from the stipulation that the option might be exercised "at any time during this charter". And that the Department did not really mean to ask such a privilege is made certain, for it asked a continuation of what the charter, and particularly paragraph 21 thereof, gave it, and nothing more. It went out of its way to refer to the terms of paragraph 21 in making its offer.

The Department asked the extension of an option which, by the terms of the instrument granting it, depended for its continued existence upon the co-existence of the charter. In so doing, it in express terms asked that the charter be extended, and that the Department be permitted to use the moneys which it might pay on account of hire, in part payment of the purchase price.

- (b) "Otherwise." Plainly meant "if not", and not "in other respects", as contended by the Department.

Plaintiffs in error contend that when the Department used the phrase "*otherwise* charter to terminate as therein provided", it plainly said "If you are unwilling to accept our offer and decline to extend the option on terms mentioned in paragraph twenty-one of charter, charter is to terminate as therein provided". In other words, the Department said "If you do accept our offer and extend the option, the charter is to continue".

The Department contended (and its construction was adopted by the District Court) that "otherwise" meant "in other respects".

Plaintiffs in error submit that such a construction of the word "otherwise", as used in this telegram, does violence to the common sense and accepted meaning of the word. The Circuit Court of Appeals agreed with plaintiffs in error in this regard, and we again quote the language in which that court condemned the Department's construction of the telegram. Judge Gilbert said:

"But counsel for the defendant say that the meaning of the word 'otherwise' as used in the telegram is 'in other respects,' and that the dispatch means 'would like to have option for purchase extended thirty days; in other respects the charter to terminate as provided therein.' *If that was the message intended to be conveyed, the word 'otherwise' was unfortunately chosen. That meaning, it seems to us, is not suggested by the other words of the telegram, and is not the natural meaning.*" (Tr. p. 157.)

We submit that the Circuit Court of Appeals is unquestionably right in saying that the construction claimed by the Department "*is not suggested by the other words of the telegram, and is not the natural meaning*" of the word "otherwise" as here used. Such being the case, however, it necessarily results that the construction claimed by plaintiffs in error, namely, that "otherwise" meant "if not", is the only possible construction. The Circuit Court of Appeals, therefore, erred in failing to so hold.

(2)

IF THE WORDING OF THE TELEGRAM OF SEPTEMBER 12, 1911, WAS AMBIGUOUS, NEVERTHELESS, BY ALL THE CANONS AND RULES OF CONSTRUCTION, IT MUST BE HELD TO HAVE BEEN INTENDED AS AN OFFER TO EXTEND THE CHARTER.

Our first contention is that the telegram of September 12, 1911, was by its terms an express offer to extend the charter with the option—that is was not susceptible to any other construction.

But if the telegram was capable of two possible meanings, that is, if it might be read as either an offer to extend *the charter with the option*, or *the option alone*, then it was ambiguous, and no more. If ambiguous in this respect, then we contend:

- (a) That the Department having drawn the telegram, that construction is to be given it which is less favorable to the United States;

- (b) That as the Department had immediate notice of the construction put upon the telegram by plaintiffs in error and did not dissent therefrom, the court must adopt such construction;
 - (c) That the Circuit Court of Appeals erred in holding the rule last mentioned to be one of equitable estoppel, it being a rule for the construction of contracts;
 - (d) That the Circuit Court of Appeals erred in affirming the judgment, even if its own theory of the case be accepted, because the District Court ruled out *as immaterial* the offers made by plaintiffs in error to prove that they "changed their position" in reliance upon the Department's non-response to the telegram of September 14, 1911;
 - (e) That all of the evidence showed that the parties intended to extend the charter, and not the option alone;
 - (f) That the same rules of construction apply to contracts between the Government and individuals as between private individuals.
- (a) If the ambiguity existed, then the telegram must be construed as an offer to extend the charter, because the Department drew it. The rule, that where an instrument is ambiguous it is to be given the construction less favorable to the party employing the ambiguous language, has been held to apply to government contracts.

We invoke a settled rule of construction, 9 Cyc., 590:

"It is a well-settled rule of construction that words will be construed most strongly against the

party who used them; the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage."

Phoenix Insurance Co. v. Slaughter, 12 Wall. 404; 20 L. Ed. 444;
Noonan v. Bradley, 9 Wall. 394; 19 L. Ed. 757;
Turner v. Meridian F. Ins. Co., 16 Fed. 454;
Otis v. United States, 20 Ct. Cl. 315;
Gantz v. Dist. of Columbia, 18 Ct. Cl. 569.

It has been held by the Fourth Circuit that this rule may be invoked against a Department of the Government.

United States v. Newport News Shipbuilding & Dry Dock Co., 178 Fed. 194:

"The rule that a contract is to be construed most strongly against the party who prepares it applies to the United States with respect to its contracts with private parties."

The same rule was applied in

Scully v. United States, 197 Fed. 327, 343,
 Judge Farrington saying:

"The rule that a contract is to be construed most strongly against the party preparing it applies to the government in a case like this, as well as to an individual."

The case referred to arose out of an ambiguity existing in a contract between a surveyor and the Surveyor-General of the United States, the contract having been prepared by the latter.

This court applied the same rule against the Government in construing an ambiguous clause in a contract for the purchase of arms in

Garrison v. United States, 7 Wall. 688; 19 L. Ed. 277,

Mr. Justice Miller saying:

“The supplementary agreement is signed by General Butler, and not by plaintiff. Its doubtful expressions should, therefore, according to a well known rule, be construed most strongly against the party who uses the language.”

See also:

Simpson v. United States, 31 Ct. Cl. 217, 243;

Otis v. United States, *supra*;

Gantz v. Dist. of Columbia, *supra*.

The telegram of September 12, 1911, was drawn and sent by the Department of Commerce and Labor. That Department employed the language out of which the alleged ambiguity arose. We see no possible escape from the application of the rule established in the cases just noted.

- (b) Even if the telegram was ambiguous, the Department knew which meaning was attached to it by plaintiffs in error, and did not complain. The court must, therefore, adopt that construction. The Department did not reply at all to the telegram of September 14, 1911, and in replying to the telegram of October 10, 1911, did not dissent from the construction therein placed upon the telegram of September 12, 1911, by plaintiffs in error.

It is stipulated that on September 14, 1911, the Department actually *received* from plaintiffs in error the following telegram:

"San Francisco, Sept. 14, 1911.

Acting Secretary,
Dept. of Commerce & Labor,
Washington, D. C.

As requested in your telegram of twelfth instant charter steamer 'Homer' hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase.

J. HOMER FRITCH, INC."

Nevertheless, the Department did not utter a word to the effect that this was an incorrect interpretation of its telegram of the 12th until two weeks after the expiration of the thirty days. Even when plaintiffs in error wired it on October 10, 1911, that "your extension of *charter* and option of steamer Homer expires October thirteenth" (tr. p. 28), it did not dissent, but replied simply, "Replying yours October tenth Bureau of Fisheries is not in position to purchase Homer".

These facts bring the case squarely within a rule settled by the authorities, namely, that where a contract is ambiguous and capable of more than one meaning, and one party is given notice of the meaning which the other party places upon it, but does not object, the Court will adopt such meaning.

2 Page on Contracts, Sec. 1127, p. 1752:

"If a promise is so ambiguous as to be susceptible of more than one interpretation and the promisor knows which of these possible meanings the promisee attaches to the promise, that meaning will be adopted by the court in construing the contract. The same rule applies where the promisor has reason to suppose that the promisee understands the ambiguous promise in a particular sense."

Hoffman v. Aetna Fire Ins. Co., 32 N. Y. 405, 413:

"It is a rule of law, as well as of ethics, that where the language of a promisor may be understood in more senses than one, it is to be interpreted in the sense in which he had reason to suppose it was *understood* by the promisee."

Barlow v. Scott, 24 N. Y. 40:

"A promise is to be interpreted in that sense in which the promisor knew that the promisee understood it."

And here again we find that the Federal courts have applied the general rule of construction against the government in determining the meaning of its contracts with individuals.

In

Central Pac. Ry. Co. v. United States, 28 Ct. Cl. 427,

the Court of Claims held:

"A construction given to a contract by the express declaration of one party and the silent acquiescence of the other, prior to and during the performance of a service, cannot be repudiated after a party has acted upon the faith of it."

In

Scully v. United States (supra), 197 Fed. 327, 343,

Judge Farrington said:

"It is a well established principle, that when there is a doubt as to the meaning of a contract, a party will be held to that meaning which he knew the other party supposed the words to bear."

Particularly in point is the case of

Brent v. Chas. H. Lilly Co., 174 Fed. 877.

The question was whether the word "bushel" used in a contract meant fourteen pounds. In holding that it did, Judge Donworth, speaking for the Circuit Court in Washington, said:

"There can be no question but that the plaintiff at all times understood the contract to call for 14 pounds to the bushel. The contrary is not seriously contended by defendant. Now in his letter of June 27th to the defendant (Plaintiff's Exhibit E) plaintiff expressly defined a bushel as being 14 pounds; and, while defendant acknowledged the receipt of this on July 2d (Exhibit F), and corrected plaintiff's understanding of the contract in other respects, it made no objection to, or criticism of, this feature of plaintiff's letter. Conceding that defendant was not bound by any notice of the custom defining a bushel as 14 pounds in first placing its order, it was fully informed of plaintiff's understanding to that effect when it received plaintiff's letter of June 27th. * * *

It is submitted that the authorities cited under this heading are conclusive of the case. It is a conceded fact that the Department knew on September 14, 1911, that its telegram of the 12th had been interpreted by plaintiffs in error as an offer to extend *the charter*. The Circuit Court of Appeals held, and we think that it must be conceded, that the telegram was at least capable of such a construction. The Department did not say a word to indicate to plaintiffs in error that they were mistaken in their reading of the telegram until long after the thirty days had expired.

What explanation, we ask, have the representatives of the government to make for this implied assent of the Department? The good faith of plaintiffs in error is not denied. Evidence of such good faith was excluded by the trial court on the ground that it was not questioned (tr. pp. 49-50). It was not denied that the plaintiffs' vessel actually was held inactive and at the government's disposal for the full period of thirty days (tr. p. 88). It is not denied that Lembkey knew of this or that he went aboard her while she was in the creek (tr. p. 88). The Department itself was advised by plaintiffs in error that they had extended the "charter", and was not entitled to assume that, having extended the charter, plaintiffs in error would do otherwise than hold the vessel subject to the Department's orders during the period of the extension. No reason whatever is shown why the Department could not have advised plaintiffs in error of this mistake—if mistake it was. Nothing is presented to overcome the almost necessary conclusion from the facts that the Department's present interpretation of the telegram is an afterthought.

It would be strange if no legal barrier to so grossly unfair a course of conduct could be found.

We respectfully submit that the case is squarely within the rule invoked, and that, assuming that there is an ambiguity in the telegram of September 12th, the Court must adopt the construction which the Department knew plaintiffs in error had placed upon it—namely, that it was an offer to extend *the charter* as well as the option.

- (c) The Circuit Court of Appeals erred in holding the rule to be one of equitable estoppel. It is a rule of the construction of contracts.

This would seem to be a matter definitely settled by authority.

If the rule rested in estoppel it could never be invoked against the sovereign. The Federal Courts have repeatedly applied it against the United States.

Cent. Pac. Co. v. U. S., *supra* (Ct. Cl.);

Scully v. U. S., *supra* (District Ct.);

U. S. v. Newport News Shipbuilding & Dry Dock Co., *supra* (C. C. A. 4th Circuit);

Simpson v. U. S., *supra* (Ct. Cl.);

Otis v. U. S., *supra* (Ct. Cl.);

Gantz v. Dist. of Columbia, *supra* (Ct. Cl.);

Garrison v. U. S., *supra* (U. S. Supreme Ct.);

Merriam v. U. S., *infra* (U. S. Supreme Ct.);

U. S. v. R. P. Andrews & Co., *infra* (U. S. Supreme Ct.).

Moreover, in express language Judge Thayer, in an opinion concurred in by Mr. Justice Brewer, definitely makes the distinction (obvious enough in principle) and says that the rule is not a rule of estoppel, but is a rule of the construction of contracts.

Central Trust Co. v. Wabash, St. L. & P. Ry. Co.,
34 Fed. 254 258:

"We do not hold that the conduct of the St. Louis, Kansas City & Northern Railroad and its successors in paying mileage creates an estoppel against it and its successors, but we do hold that the interpretation so put upon the agreement should determine its true construction, unless, it is at

variance with the express provisions of the instrument, which in this instance does not appear to us to be the case."

The reason is plain. When parties to contracts use ambiguous language—language capable of two distinct and different meanings—the courts must have some rules to guide them in fixing on the intended meaning. This rule is one of them. The courts look to the actions of the parties to discover the true meaning.

On thoroughly settled authority, and on reason as well, the Circuit Court of Appeals erred in holding the rule to rest on estoppel. It erred in holding that it was at all necessary for plaintiffs in error to show that they "changed their position" in reliance upon the failure of the Department to notify them of its dissent from the construction which they placed on the telegram of September 12, 1911.

- (d) **The Circuit Court of Appeals erred in affirming the judgment even upon the theory of the case which it adopted. Plaintiffs in error expressly offered to show that they changed their position in reliance upon the failure of the Department to express its dissent from the construction which they placed on the telegram of September 12, 1911, but the District Court ruled out the evidence as immaterial.**

Plaintiffs in error in the District Court offered to show that during September, 1911, they had opportunities to sell the "Homer" to other parties, which they permitted themselves to forego or defer owing to their belief (based upon the Department's failure

to dissent from their telegram of September 14, 1911) that the charter was extended.

We can best emphasize how different was the view which the District Court took of the case from that taken by the Circuit Court of Appeals by quoting the assignments of error in this connection.

ASSIGNMENT 17

Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness John D. McKee, covered by Plaintiffs' Exception No. 3, as follows:

"MR. CASSELL. Q. *Will you state what was the nature of the negotiations you then had pending for the sale of the 'Homer' to other parties in the event that the sale to the Government did not go through in accordance with the terms of the provisions of clause 21 of the charter-party.*

"MR. THOMAS. We object to the question, if your Honor please, upon the ground that the answer would be immaterial, irrelevant and incompetent, and it would have no bearing at all on this case.

.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiff's Exception No. 3. (Tr. p. 176.)"

ASSIGNMENT 27.

Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness J. Homer Fritch, covered by Plaintiffs' Exception No. 41, as follows:

"Q. *Do you remember whether during the month of September, 1911, you received any offer*

from anyone other than the Government to purchase the steamer 'Homer'?

Mr. THOMAS. We object to that question as incompetent, irrelevant and immaterial.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiff's Exception No. 14."

ASSIGNMENT 28.

Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness J. Homer Fritch, covered by Plaintiffs' Exception No. 15, as follows:

"Mr. CASSELL. Q. *Were negotiations pending during the month of September with other parties than the Department of Commerce and Labor in which you were looking towards the sale of the steamer 'Homer' to such parties in the event that the Government did not exercise its option?*

Mr. THOMAS. Same objection.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 15."

ASSIGNMENT 29.

Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness J. Homer Fritch, covered by Plaintiffs' Exception No. 16, as follows:

"Mr. CASSELL. Q. *Did those negotiations subsequently go through when the Government failed to exercise its option?*

Mr. THOMAS. Same objection.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plain-

tiffs now assign said exception to said ruling as Plaintiffs' Exception No. 16."

ASSIGNMENT. 19.

Said Court erred in refusing to reverse the judgment of the said District Court for its error in sustaining the objection of the United States of America to a question propounded to the witness John D. McKee, covered by Plaintiffs' Exception No. 6, as follows:

"Mr. CASSELL. Q. *Was it the belief of yourself, at that meeting, and at all times thereafter during the months of September and October, 1911, that that charter had been extended by those telegrams?*

Mr. THOMAS. I desire to object to that question, your Honor, upon the ground that the belief of Mr. McKee is in no wise binding upon the defendant.

The Court thereupon sustained respondent's said objection, to which plaintiffs excepted, and plaintiffs now assign said exception to said ruling as Plaintiffs' Exception No. 6."

ASSIGNMENT 18.

The matter referred to in assignment 18 is still more specific and clear on the point. On September 15, 1911, one W. S. Scammell offered to purchase the "Homer". The contract which was then made with Scammell showed that plaintiffs in error refused to sell, except "*if and when the charter now in force upon the S. S. 'Homer' in favor of the U. S. Government * * * shall terminate. * * **"

No more conspicuous or specific proof of "change of position" could have been offered. The District Court, however, held the contract immaterial and ruled it out. The contract, though ruled out, was marked

for identification and brought up with the record. It read as follows:

(PLAINTIFFS' EXHIBIT NO. 1 FOR IDENTIFICATION—
MEMORANDUM, DATED SEPTEMBER 15, 1911.)

"San Francisco, California, September 15, 1911.

Receipt is acknowledged by the undersigned from Mr. Walter S. Scammell of the sum of one thousand (\$1000) dollars, being payment on account of the purchase of the SS. 'Homer' upon the following conditions:

If and when *the charter** now in force upon the SS. 'Homer' in favor of the U. S. Government, which charter contains an option in favor of the U. S. Government to purchase the SS. 'Homer', shall terminate (which is expected to be about thirty days from this date), and if the U. S. Government does not exercise its option to purchase the said SS. 'Homer', then the interest of the undersigned in the said SS. 'Homer' is to be sold, assigned and transferred to the said Walter S. Scammell upon payment therefor at the rate of thirty-five thousand (\$35,000) dollars for the entire vessel, as follows:

Cash upon delivery of Bill of Sale, eight thousand (\$8000) dollars, (including the deposit of \$1000, herein acknowledged) the balance in five equal notes payable to the order of the undersigned, six, twelve, eighteen, twenty-four and thirty months from date of transfer, bearing interest at six per cent. per annum, secured by first mortgage upon the said interest in the said SS. 'Homer'; the maker and form of the said mortgage to be mutually satisfactory to the said Scammell and the undersigned.

If the U. S. Government exercises its option to purchase the said SS. 'Homer', the above deposit of \$1000 is to be returned upon the order of the said Scammell.

* *Italics ours.*

If the option to purchase the said SS. 'Homer' is not exercised by the U. S. Government, and the purchase of the said SS. 'Homer' is not completed by the said Scammell (upon the conditions above set forth) within fifteen days after notice to him by the undersigned that the option of the U. S. Government has not been exercised, then and in that event the above-mentioned deposit of \$1000 shall be forfeited to the undersigned.

The interest of the undersigned in the said SS. 'Homer' to be transferred free and clear of all liens or indebtedness.

Insurance premium to be prorated.

Time is of the essence of this memorandum.

(Signed) JOHN D. McKEE,

Approved by:

W. S. SCAMMELL.

Witness:

W. J. WOODSIDE."

(Tr. pp. 51-52.)

In denying the petition for rehearing the Circuit Court of Appeals said of this contract:

"But the plaintiffs offered no proof that the option to purchase was ever carried out * * *"
(Tr. p. 163).

We again point to assignment 29 from which it appears that the District Court sustained an objection upon the ground of immateriality to the question:

"Q. Did those negotiations subsequently go through when the Government failed to exercise its option?"

The foregoing evidence, had it been admitted, would have shown that on *September 15, 1911*, a bona fide offer for the immediate purchase of the "Homer" was made to plaintiffs in error by Scammell. It would

have shown that plaintiffs refused to sell unconditionally. It would have shown conclusively that plaintiffs would have sold but for their belief that *the charter* had been extended, because plaintiffs in error did bind themselves to sell to Scammell "if and when *the charter* now in force * * * shall terminate". It would unquestionably have shown "change of position" by plaintiffs in error in reliance upon the fact that the charter had been extended—namely, that plaintiffs in error, being confronted with an immediate opportunity to sell the "Homer" and accept the price offered by Scammell therefor, deferred that opportunity for the period of thirty days, *assigning as their reason for so doing the fact that the charter had been extended.*

We submit that there is no escape from the conclusion that the erroneous theory upon which the District Court tried the case absolutely precluded the plaintiffs in error from proving the very facts which the Circuit Court of Appeals held to be essential to their case.

- (e) Assuming that the ambiguity existed, the true meaning should have been ascertained from all of the attendant facts. So viewed the telegram was unquestionably an offer to extend the charter.

Where an ambiguity exists in a contract its true meaning must be ascertained by a consideration of all of the attendant circumstances. The court must place itself so far as possible in the situation of the parties, in order to determine what they intended by the ambiguous language. This rule has been invariably

applied in construing ambiguous contracts to which the government has been a party.

9 Cyc., 587:

"To determine the intention of the parties, if the meaning is not clear, it is necessary that regard shall be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view, for which purpose parol evidence is admissible."

Merriam v. United States, 107 U. S. 437; 27 L. Ed. 531:

"In the construction of contracts the courts may look, not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made. * * *

"It is a fundamental rule that in the construction of contracts the courts may look, not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made."

In

Reed v. Merchants Mutual Ins. Co., 95 U. S. 23; 24 L. Ed. 348,

a clause in an insurance policy was found to be ambiguous. The clause read "the risk to be suspended while vessel is at Baker's Island loading". The insurance company claimed that this meant "at any time while the vessel is at Baker's Island for the purpose of loading"; the insured claimed that it meant only while the vessel was actually engaged in loading.

In reaching a determination as to the meaning of this clause this court said, speaking through Mr. Justice Bradley:

“A strictly literal construction would favor the latter meaning. But a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question is manifest, we think, from all the circumstances of the case. Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities. On this subject Professor Greenleaf says: ‘The writing, it is true, may be read by the light of surrounding circumstances, in order more perfectly to understand the intent and meaning of the parties; but, as they have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, or substituted in its stead. The duty of the courts in such cases is to ascertain, not what the parties may have secretly intended, as contradistinguished from what their words express, but what is the meaning of the words they have used.’ 1 Greenl. Ev., sec. 277.

Mr. Taylor uses language of similar purport. He says: 'Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter. With this view, extrinsic evidence must be admissible, of all the circumstances surrounding the author of the instrument.' Taylor, Ev., sec. 1082. Again he says: 'It may, and indeed it often does, happen that, in consequence of the surrounding circumstances being proved in evidence, the courts give to the instrument, thus relatively considered, an interpretation very different from what it would have received, had it been considered in the abstract. But this is only just and proper; since the effect of the evidence is not to vary the language employed, but merely to explain the sense in which the writer understood it.' Taylor, Ev., sec. 1085.

"The principles announced in these quotations with the limitations and cautions with which they are accompanied, seem to us indisputable."

Speaking of the construction of an ambiguous clause in a grant, this court said in

Cavazos v. Trevino, 73 U. S. 773; 18 L. Ed. 813:

"In construing this grant, the attendant and surrounding circumstances, at the time it was made, are competent evidence for the purpose of placing the court in the same situation, and giving it the same advantages for construing the paper, which were possessed by the actors themselves. The object and effect of such evidence are, not to contradict or vary the terms of the instrument but to enable the court to arrive at the proper conclusion as to its meaning and the understanding and intention of the parties."

In a recent opinion written by Mr. Chief Justice White, this court affirmed a judgment of the Court of Claims against the United States.

United States v. R. P. Andrews & Co., 207 U. S. 229; 52 L. Ed. 185.

The judgment was for the price of certain paper furnished by the plaintiff to the authorities in the Philippine Islands. The contract was in writing, but was ambiguous as to whether or not the United States or the Insular Government was the direct contracting party. In an extensive opinion Mr. Chief Justice White held that in view of all of the attendant circumstances, the negotiations for the contract, its execution and the subsequent conduct of the parties with respect to it, the Government of the United States was liable.

Plaintiffs in error stand first upon the ground that the language of the telegram of September 12, 1911, makes it an *express* and unambiguous offer to extend the charter as well as the option. If, however, it is held that the telegram is ambiguous and that therefore the court must look to the surrounding circumstances to determine which meaning was intended by the parties, there can be but one result. In other words, we ask merely that the court apply to this case the same rule that was applied by Mr. Chief Justice White in the case last cited.

The prior transactions—the circumstances leading up to the sending of the telegram—show that the extension of the charter was what was intended.

The Department had on hand a fund of \$20,000 legally available for the purchase outright of the

"Homer". The price asked was \$45,000. The Department had on hand a further sum, which, though not available for the purchase, was available for the chartering of the vessel. We have quoted the letters in which Lembkey, writing for Bowers, the Commissioner of Fisheries, advised plaintiffs of these facts and further advised them of the scheme that the Department had in mind. That was to charter the "Homer" at the usual rate, to insert in the charter an option permitting the purchase during the charter and giving the Department the right to apply moneys due as hire upon the purchase price. It was the intention of the Commissioner, so writes Lembkey in the letter of December 15, 1910,

"to allow the charter money to accrue to an amount equal to the purchase price, less \$20,000; and then, being in a position to state that he virtually could buy the ship for \$20,000, he would proceed to do so".

In the letter of December 2, 1910, Lembkey was even more specific. He says:

"If we were to charter the 'Homer' this spring, therefore, it would be on the understanding that the charter money so paid should apply on the purchase price. Then we could prolong the charter, perhaps, by laying her up in the Creek or by some other arrangement, until the charter money would reach an amount equal to the balance of the purchase price."

On September 12, 1911, the Department was confronted with this situation. The "Homer" had earned approximately \$17,100 hire during the summer. This brought the Department within about \$5000 of the pur-

chase price of the "Homer", less the \$20,000 fund which it had available. An extension of thirty days of the charter and the payment of an additional thirty days' hire would enable the Government to exercise its option. If the charter were not extended the entire benefit of the \$17,100 paid as hire during the summer would be lost.

Under these circumstances—occurring identically as they had been outlined in Lembkey's letters—the telegram of September 12th was sent by the Department.

The contemporaneous understanding of everyone who had anything to do with the telegram was shown to be that it was intended to extend the charter. McKee and Fritch, who handled the transaction for plaintiffs in error, plainly believed it, and their good faith was not questioned (tr. pp. 49-50). That Lembkey, the Department's accredited agent on the Pacific Coast, believed it, is manifest from the endorsement which, on the 13th of September, 1911, he placed upon the duplicate of the charter in plaintiffs' possession. That endorsement read:

"According to telegram of September 12th received from Mr. Chas. Earl, Acting Secretary, Department of Commerce & Labor, this Charter is hereby extended for a period of 30 days from September 13th, 1911.

"Subject to approval of Dept. of Commerce & Labor.

W. I. LEMBKEY,
Agent Seal Fisheries."

(Tr. p. 27.)

Moreover, Lembkey himself drafted the telegram to the Department in which on September 14th, 1911, the

Department was advised that the *charter* had been extended "as requested in your telegram of the twelfth instant" (tr. pp. 87, 88).

Finally, the subsequent actions of the Department established complete acquiescence in the construction placed upon the telegram. As we have already pointed out this affords an independent ground for the adoption of such construction. Its conduct, however, in remaining silent after being fully advised that plaintiffs considered the charter extended, furnishes additional evidence taken in conjunction with the events antecedent to, and contemporaneous with, the sending of the telegram, of the true meaning of that instrument.

In the entire record there is not one shred of evidence opposed to the plaintiffs' interpretation of this telegram. Not a single official went upon the stand to testify that it was the Department's intention to offer to extend the option alone. On the contrary, we find that Lembkey, the Department's own agent, placed himself irrevocably on record as entertaining the contrary view by endorsing an extension of the charter upon the duplicate held by plaintiffs. Nor is there a single fact shown in the record which can be said to indicate that an extension of the option alone was intended.

We submit, finally, that, if the telegram of September 12, 1911, was on its face susceptible to either of the two constructions, all of the facts which were shown as to the events which led up to it, which attended its sending and receipt, and which manifested the understanding of the parties, demonstrate conclusively

that it was viewed and intended by both parties as an offer to extend the charter. And there is not a shred of evidence, or a single fact, in the record, which supports a contrary view.

- (f) The same rules govern the construction of a contract between the United States government and a private individual as one between two individuals.

In

United States v. Newport News Shipbuilding & Dry Dock Co., 178 Fed. 194, 203,

Judge Pritchard said, speaking for the Fourth Circuit:

"In construing this contract we should treat it just the same as though it was a contract between individuals rather than an individual and the government as in this instance."

Citing:

Smoots' Case, 15 Wall. 36; 21 L. Ed. 107,

where Mr. Justice Miller, speaking for this court, said:

"There is, in a large class of cases coming before us from the Court of Claims, a constant and ever recurring attempt to apply to contracts made by the Government, and to give to its action under such contracts a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals.

* * * * *

"In approaching the inquiry into the effect which the action of the Bureau of Cavalry, in adopting these new rules for inspection, had upon the rights of the parties to this contract, let us endeavor to free ourselves from the consideration that the Government was one party to the contract, and that it was for a large number of horses; for we

hold it to be clear that the principles which must govern the inquiry are the same as if the contract were between individuals, and the number of horses one or a dozen instead of four thousand."

In

S. H. Hawes & Co. v. Wm. R. Trigg Co., 65 S. E. 538, 549,

it was said:

"A contract between the United States Government and a citizen or a corporation for the building of a boat or vessel for the use of the government or of any department thereof differs in no essential feature from a contract between two citizens, or between an individual citizen and a corporation. The rules of construction are the same in either case, and the contract is entered into subject to the principles referred to above."

We have already noted that in specific instances the courts have applied, without abatement, the ordinary rules governing the construction of contracts to contracts of the various departments of the United States.

The District Court fell into error in departing from this rule. In deciding the case, the learned trial judge said:

"The COURT. * * * I do not think, Mr. Cassell, that the court would be justified in rendering a judgment *against the Government* on such uncertain evidence. There is room, however, for a different view, perhaps, *but it should be taken by an Appellate Court*. I think that, *sitting as a court of first instance*, I would not be justified in granting the relief asked in your second cause of action. You may have full findings and if the Circuit Court of Appeals takes a different view it would simply result in judgment going your way for the balance.

Judgment can go under the first cause of action for the amount due thereunder." (Tr. p. 95.)
(The italics are ours.)

It is submitted that measured by the ordinary rules which govern the contracts of individuals, the rights of plaintiffs in error are clear. That no different rule should be applied in favor of the Government is, it is submitted, a matter established both in reason and authority.

It is respectfully submitted that the judgments of both courts below should be reversed and that the Circuit Court of Appeals for the Ninth Circuit should be directed to reverse the judgment of the District Court and remand the cause to that court, with instructions to enter judgment in favor of plaintiffs in error for the full amount demanded in the second count of their complaint.

Dated, San Francisco,

December 15, 1917.

Respectfully submitted,

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

Attorneys for Plaintiffs in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

J. HOMER FRITCH, INCORPORATED; E. T. Kruse, Mary Bell Parker Burns, et al., plaintiffs in error, v. THE UNITED STATES.	}	No. 312.
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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

The judgment under review is one affirming a judgment of the District Court for the Northern District of California, which denied a recovery against the United States for \$4,488.75 alleged to be due for the hire of the steamship *Homer* for a period of thirty days beginning September 13, 1911. 234 Fed. 608; Petition for rehearing denied, 236 Fed. 133.

STATEMENT OF THE CASE

During the summer of 1911 the Government had employed the *Homer* in connection with the Alaskan seal fisheries, having chartered it under contract dated April 24, 1911, for a period which ended September 12, 1911, when its cargo was fully discharged and it was turned back to its owners. This contract

gave to the Government, by section 14, the option to continue the charter for an additional thirty days upon giving notice twenty days before its expiration and, by section 21, the option to purchase, at any time during the charter, at a fixed price less such amounts as should have been paid in the meantime as hire. (R., pp. 21 and 23.)

On September 12 the right to continue the charter for 30 days had expired and the Government was not ready to purchase. Hence, it turned the vessel back to the owners.

During the month following, the Government made no use of and exercised no control over the boat. The contention that it is liable for the amount now claimed is based on the allegation that a new contract was entered into whereby the charter was extended for an additional 30 days. If there was such a contract, it resulted from the following interchange of telegrams, viz:

WASHINGTON, D. C., *Sept. 12, 1911.*

J. HOMER FRITCH, INC.,

San Francisco, Cal.

Would like to have option for purchase of *Homer* extended thirty days on terms mentioned in paragraph twenty one of charter otherwise charter to terminate as provided therein answer.

CHARLES EARL,
Acting Secretary.

SAN FRANCISCO, *Sept. 14, 1911.*
ACTING SECRETARY,
Dept. of Commerce & Labor,
Washington, D. C.

As requested in your telegram of twelfth instant charter steamer "*Homer*" hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase.

J. HOMER FRITCH, INC.

The trial court found that there was no contract to extend the charter. While we think the foregoing telegrams are conclusive of the correctness of the judgment below, we now state certain other facts which were found by the court.

On or about September 13, the representative of the plaintiffs in error submitted the above telegram of September 12 to one Lembkey, a seal-fisheries agent, but without authority to bind the Government by contract, who indorsed on the copy of the contract of April 24, held by the plaintiffs in error, the following (Rec. 26-27):

According to telegram of September 12th received from Mr. Chas. Earl, Acting Secretary, Department of Commerce & Labor, this Charter is hereby extended for a period of 30 days from September 13th, 1911.

Subject to approval of Dept. of Commerce & Labor.

W. I. LEMBKEY,
Agent Seal Fisheries.

But it does not appear that this indorsement was ever called to the attention of or approved by the Department of Commerce and Labor.

After September 14, there was no communication between the parties until October 10, 1911, when the representative of the plaintiffs in error wired the Commissioner of Fisheries:

Your extension of charter and option of steamer "*Homer*" expires October 13th. Should this expire without further action on the part of the department Ship will go to holder of second option upon which one thousand dollars has been paid. Should you indicate that you wish to exercise your option terms of payment can be satisfactorily arranged without doubt. Kindly wire your wishes in the premises. (R., pp. 28-29.)

The reply was:

Replying yours Oct ten Bureau of Fisheries is not in position to purchase *Homer*. (R., p. 29.)

And later, when a bill was rendered for the amount now in controversy, the Secretary replied that—

the vessel was discharged and relinquished to her owners on September 12 noon and that the Department has not extended or renewed the charter nor approved the action of any officer of the Department attempting to bind it for charter money beyond that time. (R., p. 30.)

There are 19 assignments of error based on exceptions by the plaintiffs in error, because the court

refused to find, at their request, certain facts. These facts were:

That for several years the department had been desirous of purchasing the *Homer*, which it had been chartering for use during the summer months in connection with the Alaska seal fisheries, a purpose for which it was well adapted; that during the fall of 1910 and spring of 1911 negotiations for its purchase were pending and plaintiffs in error were advised that, while the department had a considerable fund available for chartering vessels, it had only \$20,000 available for purchase; but that they were also advised that if the charter money to be paid during the summer of 1911 could be applied in reduction of the purchase price, the purchase might be accomplished by prolonging the charter and laying the boat up in Oakland Creek, after it could no longer be used by the Government, until the charter money would reach an amount equal to the purchase price, less the \$20,000 available for the purchase; that upon receipt of the telegram of September 12 the plaintiffs in error placed the *Homer* in Oakland Creek, where it remained until after October 13, with the knowledge of the agent Lembkey; that Lembkey expressed the belief that it was the intention, by the telegram of September 12, to extend the charter; and that the department did not advise the plaintiffs in error that it did not so intend until October 25.

If these facts had been the proper subjects of separate findings, there was evidence to establish them with this qualification:

The suggestion that the law might be circumvented by allowing charter money to accumulate during a period when the Government would have no use for the boat and then be applied as purchase money was contained only in letters from the agent Lembkey, which he was careful to mark "personal" and not to sign officially. (R. pp. 58-65.) And, prior to April 24, he had advised that this plan could not be carried out and that there was little chance for a purchase, saying:

This arises mainly from questions raised as to the propriety of the use for that purpose of some of the funds mentioned in my previous letters. (R. p. 72.)

There are 16 assignments of error based on the exclusion of testimony. The evidence rejected related to the following matters:

(1) The belief of Lembkey and the representative of the plaintiffs in error as to whether the charter was extended;

(2) Negotiations, in September, 1911, looking to a sale to parties other than the Government;¹

(3) Whether the owners would have made certain repairs in the spring of 1911 but for the expectation of a sale and whether they believed that the charter

¹ There was no effort to show that the boat would or could have been chartered or put to any profitable use prior to October 13.

would be extended so as to convert into purchase money funds not available for that purpose.

In the main it does not appear what the evidence would have been if admitted. Included in the rejected evidence, however, was a contract, dated September 15, 1911, by which, subject to the Government's option to purchase, the boat was sold to another and \$1,000 of the purchase money deposited. (R. p. 51.)

HOLDING OF THE COURT OF APPEALS.

The Circuit Court of Appeals apparently was in doubt as to whether the telegram of September 12 was an offer to extend both the charter and the option to purchase or only the option and said that if there had been nothing more than a telegram accepting the offer as made—

we should hold that the minds of the parties never met upon the understanding which the plaintiffs gave to the dispatch. (R. p. 158.)

But that court was of opinion that the telegram of September 14 gave the Acting Secretary notice that his proposition was understood to be a proposition to extend both the charter and the option, and that, if he did not assent to that interpretation, it was his duty to disclaim it. The conclusion was that, as the result of an equitable estoppel, if the plaintiffs in error, relying on the silence of the other party, had changed their position for the worse, the Government would have been bound. But because there was no such change of position, the judgment was affirmed.

CONTENTIONS OF THE GOVERNMENT.

The Government contends that:

(1) The writ of error should be dismissed for want of jurisdiction because judgments in this class of cases are subject to review by this court only upon writs of error direct to the District Court.

(2) A consideration of all the facts which the court found and all those which it was asked to find and all the evidence either admitted or offered fully sustains the conclusion that there was no contract continuing the charter beyond September 12.

BRIEF OF ARGUMENT.**I.**

The jurisdiction to review judgments of the District Courts under the Tucker Act (March 3, 1887; 24 Stat. 505, c. 359) is in this court and not in the Circuit Courts of Appeals. Hence, this court is without jurisdiction of the writ of error to the Circuit Court of Appeals.

II.

The telegram of September 12, in connection with the contract of April 24, is a plain and unequivocal request to extend the option to purchase, the remainder of the contract to terminate.

III.

The telegram of September 14 granted the request as made. If this is not true, it was a counter proposition which was never accepted.

IV.

There is nothing in the record upon which to base an estoppel.

V.

There was no error in declining to find facts as requested or excluding evidence offered.

ARGUMENT.

I.

The writ of error should be dismissed for the reason that the Circuit Courts of Appeals have no appellate jurisdiction over cases arising under the Tucker Act and that such cases can be reviewed by this court only on appeal from or writ of error to the District Court.

When the Tucker Act was passed we had both Circuit and District Courts, and this court was the only Federal Court with appellate jurisdiction, except for a limited jurisdiction in the Circuit Court.

The Tucker Act conferred upon both the Circuit and District Courts jurisdiction, with certain limitations as to amount, concurrent with that of the Court of Claims over certain suits against the United States. By sections 4 and 9 it was provided, in effect, that the procedure, including exceptions and appeal, should be the same as in similar cases in the Court of Claims.

It was accordingly held in *United States v. Davis*, 131 U. S. 36, 39, that the right of appeal in cases arising under this new jurisdiction was the same as that

given in Court of Claims cases by section 707 of the Revised Statutes, as follows:

An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court, as provided in section one thousand and eighty-nine.

By the act of March 3, 1891, 26 Stat. 826, c. 517, the Circuit Courts of Appeals were established. Section 5 enumerates certain cases, not including cases under the Tucker Act, in which appellate jurisdiction over judgments of the District and Circuit Courts is expressly vested in the Supreme Court. Section 6 confers upon the Circuit Courts of Appeals appellate jurisdiction over final judgments and decrees of District and Circuit Courts in all cases other than those enumerated in section 5 "unless otherwise provided by law." And section 14 repealed all acts and parts of acts relating to appeals and writs of error inconsistent with the provisions for review contained in sections 5 and 6.

Following the passage of this act, there was some confusion, but it was finally determined that the repealing words of the act of 1891 did not apply to the special jurisdiction of the District Court sitting as a Court of Claims and that, by virtue of sections 4 and 9 of the Tucker Act the right of appeal was the

same as that given from the Court of Claims. *Reid v. United States*, 211 U. S. 529, 537-538; *United States v. Dalcour*, 203 U. S. 408.

And if these cases can be said to have left the question in any uncertainty, all doubt was removed when *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 225 U. S. 640, was decided. It is true that the opinion in that case makes no reference to jurisdiction. But the Government squarely challenged the jurisdiction by a motion to dismiss a writ of error from this court to the Circuit Court upon the ground that the writ could issue only from the Circuit Court of Appeals. The motion was supported and opposed by elaborate briefs. This court, however, was apparently so little impressed with the assault upon its jurisdiction that it did not even mention the motion to dismiss.

There is no room for doubt then that, when, in 1911, the Judicial Code was adopted the jurisdiction to review judgments and decrees in cases arising under the Tucker Act was in the Supreme Court.

The Judicial Code undertakes to compile all the laws relating to the jurisdiction of the courts of the United States. It concludes with a section, expressly repealing many statutes, which repeals all of the Tucker Act except certain sections. Among the exceptions is section 4, referred to above, but not section 9. Many of the laws repealed, however, are reenacted, sometimes with modifications. And section 294 is as follows:

The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest.

There was no effort to change the jurisdiction of the Supreme Court or the Circuit Courts of Appeals as fixed by sections 5 and 6 of the act of 1891, those sections being reenacted, without material change, as sections 238 and 128, respectively. And the purpose not to disturb this jurisdiction as to Tucker Act cases is manifest from the fact that care was taken to exclude from the repealing clause section 4 of that act, which provided that the right of appeal "shall be governed by the law now in force," or sections 707 and 708 of the Revised Statutes, giving jurisdiction to the Supreme Court. And the latter sections, though included in the repealing clause, were reenacted as sections 242 and 243. It would seem clear then that the Judicial Code left the appellate jurisdiction in Tucker Act cases where it found it—in the Supreme Court.

Thames & Mersey M. I. Co. v. United States,
237 U. S. 19.

United States v. Emery, &c., 237 U. S. 28.

United States v. Cress, 243 U. S. 316.

United States v. Kelly, 243 U. S. 316.

In April, 1917, the Circuit Court of Appeals for the Second Circuit dismissed a writ of error to a district

court, in the case of *Tweedie Trading Company v. United States*, upon the ground that that court was without jurisdiction to review Tucker Act cases. The plaintiff presented to this court its petition for certiorari. The petition was supported by a long and most earnest brief, insisting that the Judicial Code had changed the rule, and opposed by a brief on behalf of the Government. On October 8, 1917, this court refused to grant the writ. (No. 515, October term, 1917; 245 U. S. 645.)

The *Atchison* and *Tweedie* cases, we submit, have foreclosed the question. In one, over the earnest insistence of the Government, this court exercised jurisdiction in a case arising prior to the adoption of the Judicial Code. In the other, it refused to yield to the argument that, under the Judicial Code, the jurisdiction is in the Circuit Courts of Appeals.

This case, having been removed from the District Court only by a writ of error from a Circuit Court of Appeals which had no jurisdiction to issue it, was never, in law, in the Circuit Court of Appeals and can not be brought here by writ of error to that court. The court is, therefore, without jurisdiction and the writ should be dismissed.

II.

There can be no escape from the finding of the trial court that there was no contract to hire the boat after September 12, 1911, unless it can be said, as a matter of law, that (1) the telegram of September 12 was an offer to hire the boat for an additional thirty days and

the telegram of September 14 was an acceptance of that offer, or (2) although in fact the minds of the parties did not meet, a contract nevertheless resulted, by way of an equitable estoppel, from the omission to answer the telegram of September 14.

TELEGRAM OF SEPTEMBER 12 NOT AN OFFER TO HIRE.

We will first examine the telegram of September 12 in connection with the contract of April 24 to which it refers. So examined, it is free from ambiguity and plainly can not be construed as anything more than a request for the extension of the *option to purchase*, which was then about to expire. Certainly, it contains no offer *to hire the boat* for an additional period. The language was:

Would like to have option for purchase of *Homer* extended thirty days on terms mentioned in paragraph twenty one of charter otherwise charter to terminate as provided therein answer.

The boat had been chartered by the contract of April 24. Looking to this contract, we find that, in addition to chartering the boat for a certain period, it gave to the Government two options. By paragraph 14, there was an option to extend the hire of the boat for an additional period of thirty days by giving notice twenty days before the expiration of the charter. This option had not been exercised and had lapsed. Paragraph 21, referred to in the telegram was as follows:

21. That the Charterers have the option, at any time during this Charter, of purchasing

the said vessel for the sum of Forty-five Thousand (\$45,000.00) Dollars against which any amount paid for the hire of the said Vessel less cost of operation shall be set off and deducted, but that the Purchasers shall pay interest at the rate of 6 % per annum (and insurance) on the amount of purchase money from the date of this Charter to the completion of sale.

This option was about to expire and the Government was not prepared to exercise it. In this situation the telegram in question was sent. It is explicit in its terms. It does not refer to the hire of the boat nor to the option, already expired, to hire it for an additional thirty days, but merely expresses a desire to extend the *option to purchase*. And, putting the subject matter of the request beyond doubt, it makes specific reference to the paragraph of the contract in which this option is found.

If this was all, it would, of course, be conceded that there was no offer to continue the hire of the boat. But it is insisted that such an offer is to be inferred from other language used. It is said that paragraph 21 of the contract gave the option to purchase *during this charter* and that when a request was made to extend the option "on terms in paragraph twenty one," one of the terms referred to was the continuance, during the option, of the charter. But the words "during this charter" do not express one of the *terms* on which the purchase was to be made. They merely indicate the period of time during which the right to purchase should exist on the terms stated as to pay-

ment. This time was expiring, and the telegram was merely a request for the right to purchase during the succeeding thirty days on the same terms on which the purchase could have been made "during this charter." But it is said that an offer to extend the hire of the boat must be implied from the words "otherwise charter to terminate as provided therein." The insistence is that this means that if the request is not granted the charter will terminate, which implies that if the request is granted the charter will continue and the Government will pay the hire of the boat during the time for which the option is extended. But if this is the meaning, very unnecessary circumlocution was employed to say what would naturally be expressed, thus:

Would like to extend charter of *Homer* thirty days with option to purchase on terms in paragraph twenty-one.

Moreover, if the offer made was to extend the charter, it was wholly unnecessary to add that if the offer was not accepted, the charter would terminate, since that would obviously be the result of a rejection.

Clearly, the meaning of "otherwise" in this connection is, *in other respects*. This is one of the definitions given by the Standard Dictionary. And the new English Dictionary—Murray—Vol. 7, gives the following:

Adv. (3) In other respects; with regard to other points.

"The best men otherwise are not always the best in regard of societie."

"By the report of persons otherwise pious and prudent."

"Having otherwise no reason to suspect them."

"I will give one instance of this from an otherwise sensible writer."

That this was the meaning intended can scarcely be doubted when we consider the obvious sense in which the word "charter" was used. Plaintiffs in error seek to confine it to so much of the contract as provided for the hiring of the boat as distinguished from the option to purchase. But plainly it is used in the broader sense of "charter-party," as applying to the entire contract of April 24, with all its options. Any other construction would render meaningless the expression "paragraph twenty one of charter."

In other words, the Secretary, having before him the contract of April 24, did not desire to extend the entire contract but did desire, upon the expiration of that contract, to extend the option given by paragraph 21. To accomplish this, he requested that the option be extended and, as a part of the same request, that the remainder of the contract, or the contract otherwise than as to the option, terminate according to its terms. The plain and unambiguous meaning of the telegram may be thus indicated:

Would like to have option for purchase of *Homer* extended thirty days on terms mentioned in paragraph twenty one of charter [contract] otherwise [in other respects; with

regard to other points] charter [contract] to terminate as provided therein.

We submit that there is no reasonable ground for giving this telegram any other construction.

TELEGRAM OF SEPTEMBER 14 WAS EITHER AN ACCEPTANCE OF OFFER AS MADE OR THE SUBMISSION OF A COUNTER OFFER.

The reply to the telegram above quoted was:

As requested in your telegram of twelfth instant charter steamer "*Homer*" hereby extended for further period of thirty days from September thirteenth nineteen eleven with option of purchase.

Remembering that the word "charter" had been used to describe the entire contract of April 24, this could mean nothing more than—

Contract hereby extended as [in the manner, in the respects, or to the extent] requested in your telegram.

In this view there was an acceptance of the offer by which all the contract was to terminate except the option to purchase, which was to continue for 30 days.

But if the plaintiffs in error have used language from which there can fairly be attached, as a condition to the extension of the option, an obligation to continue to pay for the hire of the boat, the telegram was a counter offer which was not accepted, and the minds of the parties did not meet.

NO OTHER FACTS TO JUSTIFY ANY OTHER CONSTRUCTION OF TELEGRAMS.

If it be assumed that there is any ambiguity in the language employed and that the court may properly look beyond the telegrams themselves and the contract of April 24 to ascertain the intent of the parties, we must reach the same result. Indeed, a consideration of all the facts found by the court, as well as all those which the plaintiffs in error insist should have been found, will add to rather than take from the force of what we have said.

On September 12 the season in which the Government could use the boat had closed. There was, therefore, no use to which it could be put during the succeeding 30 days. It was not, in fact, used, nor was there any expectation on the part of anybody that it would be used. It could hardly be said that the Secretary meant, if this language will bear any other construction, to hire a boat for which he had no use. To meet this the plaintiffs in error showed that Government officials had desired to purchase the boat, but that while there were considerable funds available for charter purposes only the sum of \$20,000 was available for purchase. In personal letters between the representative of plaintiffs in error and the agent Lembkey there had been some discussion of a scheme by which the Government might extend the charter beyond the time when the boat was needed and let the charter money for the unused boat, while tied up in Oakland Creek, accumulate until it would be sufficient to reduce the pur-

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chase price to \$20,000. It is true the plaintiffs in error had, prior to April 24, been advised, in effect, that the officials of the department would not stand for such a scheme. That scheme would clearly have been illegal. It would result in applying funds appropriated for one purpose to another purpose. And this is expressly condemned by statute:

All sums appropriated for 'the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others. (Rev. Stat. 3678; Comp. Stat. 6764.)

The telegram can not be construed as plaintiffs in error insist without imputing to the Secretary the unlawful purpose to pretend to hire a boat and leave it idle in order to use money appropriated for charter purposes for the purpose of purchase. And the court will not impute such a purpose if the language used can bear any other reasonable construction.

But if such a purpose did exist and if the telegram of September 12 is construed as an offer to extend the charter, the plaintiffs in error have proved too much. They knew that the Government had no use for the boat and would not use it. Accordingly, immediately upon their "acceptance" of the offer, they tied it up in Oakland Creek without directions from anybody. They knew that the only possible purpose was to unlawfully convert money appropriated for charter purposes into purchase money. If, therefore, the contract now claimed had been expressly entered into, it would have been illegal and not enforceable.

Elliott on Contracts, vol. 2, sec. 645; *Lingle v. Snyder*, 160 Fed. 627; *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69, 19 L. R. A. (N. S.) 964.

NO ESTOPPEL.

The Circuit Court of Appeals said that if the case rested upon the proper meaning of the word "otherwise" in the telegram of September 12, and there had been a simple acceptance, it would hold "that the minds of the parties never met upon the understanding which the plaintiffs in error gave to the dispatch." But that court was of opinion that the telegram of September 14 gave the Secretary notice that his telegram had been construed to embrace both the charter of the boat and an option to purchase, and that if he did not assent to this, it was his duty to disclaim it. It was held, however, that "the ground upon which a party will be held to that meaning which he knows the other party has placed upon his proposal is equitable estoppel," and that, since the plaintiffs in error had not changed their position in reliance upon the Secretary's silence, they were not entitled to recover. (R., pp. 158 and 159; 234 Fed. 608.)

This ruling was decidedly more favorable to the plaintiffs in error than the record justified. As we have seen, if the telegram of September 14 was not, as we insist, an unqualified acceptance of an unambiguous offer to extend only the option to purchase, to which, of course, no answer was necessary, it was an offer to accept provided there was attached a

condition that, with the option, should go the charter of the boat. This would equally impose no duty upon the Secretary. If he did not want to charter the boat, he had the right to treat this telegram as a rejection of his offer and the end of the whole matter.

It is well recognized that any change of any material stipulations or the injection of new stipulations amounts to a rejection of the offer. (Elliott on Contracts, vol. 1, sec. 41.)

National Bank v. Hall, 101 U. S. 43.

Sloan v. Wolf Co., 124 Fed. 196.

Goulding v. Hammond, 54 Fed. 639.

If it be assumed that plaintiffs in error intended their telegram to mean what they now insist, it can not be doubted, as we have shown above, that they used language which was fairly susceptible of the meaning that they agreed to the extension of the contract to the extent requested, viz, the option to purchase. Certainly, the Secretary could not be put under the duty to reply unless he had notice that the words were intended in a different sense. And he had no such notice. Nor could such a duty result from anything which may have been done in a mistaken reliance upon his silence but without his knowledge. The plaintiffs in error tied the boat up and did not use it, but there is not the slightest evidence that this fact was known to the Secretary. It does not seem possible to us, therefore, that there can be any basis in this case for the doctrine of estoppel. But if we are mistaken as to this, there can be no doubt that the Circuit Court of Appeals was

right in holding that the plaintiffs in error could not recover because they did not change their position in reliance upon the Secretary's silence.

There was no evidence either introduced or offered tending to show that the boat could have been chartered or put to any other profitable use. There was evidence tending to show that the plaintiffs in error were in financial difficulties and were anxious to *sell* and were negotiating with other parties to that end. Indeed, it is at least probable that they had a proposition to purchase before them when they received the telegram of September 12. This appears:

They delayed answering that telegram until the 14th. And on the 15th they entered into a binding contract of sale to another party on which \$1,000 was paid, to be returned if the Government exercised its option.

The agreement to extend the Government's option was evidently made because the sale to the Government, if made, would be at a better price than that offered by the other party, for the telegram of October 10 seemed to urge acceptance and suggested a willingness to make satisfactory terms of payment. But the plaintiffs in error protected themselves against the chance that the Government might not purchase by making a sale subject to the option.

In short, during practically the whole of the 30 days in question the boat was actually sold and partly paid for, subject to the Government's option, and no evidence was offered tending to show that any profitable use would or could have been made

of the boat during that time but for the silence of the Secretary.

Moreover, since we have seen that the contract claimed, if expressly entered into, would have been illegal, a valid contract to the same effect can not be set up by estoppel.

EXCLUDED EVIDENCE AND FINDINGS OF FACT DECLINED.

We have considered the case in the light of all findings either made or requested, and of all evidence either introduced or offered, and have shown, we think, that had every finding requested been made and all the evidence offered been admitted, the result would not have been changed. There are more than 30 assignments of error as to these matters. We feel justified in disposing of them in the language used by Mr. Justice Brandeis in *Louisville & Nashville R. R. Co. v. Interstate Commerce Commission*, decided January 7, 1918:

Many of the assignments of error are not now insisted upon. None deserves detailed discussion. All are unsound. 245 U. S. 463, 467.

Respectfully submitted.

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APRIL, 1918.

